87-778

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TRANSPORTATION COMMUNICATIONS UNION,
Petitioner,

v.

BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Section 3, First(q) of the Railway Labor Act, 45 U.S.C. § 153, First(q), provides that the findings and order of a division of the National Railroad Adjustment Board (NRAB) "shall be conclusive on the parties, except that the order of the division may be set aside . . . for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction."

The question presented is whether the Third Division of the NRAB exceeded its jurisdiction because it failed to discuss in the opinion accompanying its award a provision of the collective bargaining agreement that might arguably have led to a different result.

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Petitioner Transportation Communications Union prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in *Baltimore and Ohio Railroad v. Brotherhood of Railway, Airline and Steamship Clerks* (4th Cir. No. 86-2547; March 9, 1987).

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unpublished pursuant to a directive of that Court and is printed in the appendix hereto, *infra* at App. 1a-16a. The memorandum opinion of the United States District Court for the District of Maryland (Motz, D.J.) is unreported and is printed *infra* at App. 18a-27a. The opinions of the Third Division of the National Railroad

Adjustment Board are unreported and are printed *infra* at App. 29a-62a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 9, 1987 (App. 2a). A timely petition for rehearing was denied on July 15, 1987 (App. 17a). On September 30, 1987, Chief Justice Rehnquist signed an order extending the time for filing a petition for writ of certiorari to and including November 12, 1987 (App. 63a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 3, First(q) of the Railway Labor Act provides:

> If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division, or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for

> fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28.

45 U.S.C. § 153, First(q) (1982).

STATEMENT OF THE CASE

This case arises out of a dispute between petitioner Transportation Communications Union, formerly known as BRAC ("the Union") and respondent Baltimore and Ohio Railroad ("the Carrier") over the interpretation of their 1973 collective bargaining agreement ("the agreement").[1] The dispute concerns the assignment of certain work by the Carrier to yardmasters rather than to clerical employees, who are represented by the Union. Beginning in 1974, the Carrier opened Terminal Service Centers at various locations in its system and moved clerical employees from offices in the yards to centralized data centers (App. 21a). As a result, some yardmasters began to perform certain work, including the operation of communication receiving devices, which the Union believes should have been assigned to clerical employees under the agreement (App. 22a).

In 1975 the Union began to file grievances with the Carrier, asserting that the performance of this work by yardmasters violated the agreement. Because the Union and the Carrier were unable to resolve the dispute, the Union, pursuant to section 3, First of the Railway Labor Act, 45 U.S.C. § 153, First, submitted a single test case to the Third Division of the National Railroad Adjustment Board ("NRAB," "Adjustment Board" or

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[1] On September 1, 1987, petitioner changed its name from Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees ("BRAC") to Transportation Communications Union. Petitioner will refer to itself as "the Union" throughout this petition.

"Board"). This test case involved the claim of a clerical employee for one day's pay because of the operation by a yardmaster of a receiving teletype unit at a yard in Cincinnati. In an award dated July 22, 1980, a panel of the Adjustment Board chaired by neutral Richard R. Kasher sustained the Union's position. J.A. 102.[2] However, because the work in question took very little time to perform the Kasher panel declined to award the eight hours' pay sought as relief by the Union and instead awarded the aggrieved employee three hours' pay. J.A. 102.[3]

The dispute over the assignment of work affected numerous clerical employees in several cities throughout the Carrier's system. The Union accordingly submitted a number of similar grievances to the Carrier but held them in abeyance pending a decision by the NRAB panel chaired by Arbitrator Kasher (App. 32a). The Carrier refused to apply the Kasher award to the pending claims and the parties again resorted to arbitration. In April 1982 six such claims, arising in six different locations, were submitted to an NRAB panel chaired by Herbert Fishgold. In April 1983 an additional claim, arising at the Barr Yard in Chicago, was submitted to an NRAB panel chaired by Robert Silagi.

On June 28, 1984, the Fishgold and Silagi panels both issued their decisions. The Fishgold panel sustained the Unions' claims in each of the six cases presented to it.[4]

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[2] Citations to "J.A. ——" are to the Joint Appendix filed in the court of appeals.

[3] The Kasher panel's decision to award three hours' rather than eight hours' pay was based on one of the provisions of the contract. J.A. 102.

[4] The Fishgold panel issued six separate awards (App. 29a-62a). The first award, No. 24861 (App. 29a-38a), contains a complete statement of the panel's reasoning and analysis, which in turn provide the basis for the awards in the five other cases, Nos. 24862-66 (App. 39a-62a).

It based its decisions on its analysis of the arguments of the parties, the language of the agreement, the parties' complex 40-year bargaining history, and the past practices of the parties on the properties in question (App. 32a-34a). The Fishgold panel also relied upon the Kasher award (App. 34a) and distinguished the past practice at the Barr Yard involved in the case presented to the Silagi panel (App. 35a). The Fishgold panel, like the Kasher panel, awarded three hours' pay for each claim, rather than the eight hours' pay sought by the Union (App. 37a).[5]

In contrast to the Kasher and Fishgold panels, the Silagi panel denied the Union's claim concerning the assignment of work at the Barr Yard in Chicago. J.A. 99. The Silagi panel reviewed the history of the dispute and analyzed the parties' contentions but emphasized the past practice on the property in question, finding that yardmasters at the Barr Yard had been performing the disputed work since 1948 and that the Union had not challenged this practice on that property until after 1973. J.A. 98.[6]

The Carrier thereupon brought an action to set aside the six Fishgold awards.[7] Cross-motions for summary

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[5] The Fishgold panel also commented that "[w]hile the Board realizes that some may regard such payment as excessive, the Board must remind the parties [that] '. . . the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. In such cases the result is based upon the clear language of the contract, not upon the equities involved.'" (App. 37a (*quoting* F. Elkouri and E. Elkouri, *How Arbitration Works* 304 (3d ed. 1973)).

[6] The Silagi panel reasoned that "[t]he parties[']' own conduct for a quarter of a century simply cannot be ignored, it is the best evidence that there was no intent to terminate this minimal work assignment to yardmasters." J.A. 98.

[7] The Union counterclaimed to enforce the awards pursuant to section 3, First(p), 45 U.S.C. § 153, First(p).

judgment were filed and the district court held two lengthy evidentiary hearings in which it explored the meaning of the contract. At the commencement of the first evidentiary hearing the court informed the parties that:

> [I]t seems entirely senseless to me for people to be sitting around in the yardmasters' office costing the railroad millions of dollars in an industry which has economic difficulties to pull off perforated sheets. . . . This dispute to me is not a minor dispute [but is] one with . . . wide-ranging economic [implications] for the railroad and does not by any stretch of the imagination in common sense seem to me to be a minor dispute and seems to me to be entirely a different kind of dispute than that which is given [a] very, very narrow standard of review. . . . I don't know whether what I'm saying is that there should be a fourth exception to the standard of review [of NRAB awards] . . . or whether or not one simply says that there are cases in which that standard does not apply.

J.A. 388-89. At the second evidentiary hearing the court addressed counsel for the Union and said, "I'll be candid with you, I could be wrong, I could be reversed, but this court is not going to award eight hours pay or three hours pay to somebody for a couple of minutes work." J.A. 505. In addition, the court submitted to counsel two memoranda requesting written responses to eight intricate questions regarding the history and interpretation of specific provisions of the agreement. J.A. 440, 458-59.[8]

On February 25, 1986, the district court granted the Carrier's summary judgment motion. The court acknowledged that the question was "complicated by a number of prior agreements and interpretations, changes in the technology of message transmission and the merger of the

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[8] These questions elicited detailed responses from the parties which totalled 38 single-spaced pages. J.A. 441-57, 460-81.

clerks' and telegraphers' unions in 1973" (App. 18a)—in other words, that it was precisely the kind of contract interpretation question properly committed to the NRAB with its special railroad expertise. Nonetheless, the district court concluded that it had "the responsibility to examine the arbitrator's decision, taking into account the history as well as the language of the agreement" (App. 21a). It accordingly set aside the Fishgold panel's six awards because of its view that the panel had exceeded its jurisdiction by failing to rule in favor of the Carrier based on a provision of the agreement, Rule 1, which in the district court's view, "could be neither more clear nor more clearly applicable to these facts" (App. 24a).[9]

A divided panel of the court of appeals affirmed, relying upon the non-Railway Labor Act case of *Clinchfield Coal Co.* v. *District 28, United Mine Workers*, 720 F.2d 1365 (4th Cir. 1983).[10] The court reasoned that although the Fishgold panel's opinion "acknowledges that B&O had relied upon the Scope Rule . . . the panel failed to discuss the provisions of the Scope Rule or its applicability to the instant dispute" (App. 6a). "Even a cursory reading" of that rule, the panel majority said, would support the carrier's position (App. 8a-9a). Hence, "[b]ecause the NRAB panel has provided no explanation of either the Scope Rule provisions at issue here, or their applicability

[9] Rule 1, also referred to as the "Scope Rule," defines the scope of the work covered by the agreement.

The district court further ruled that even if the panel's contract interpretation had not exceeded its jurisdiction, its orders could be set aside because the award of three hours' pay per day to each claimant constituted unwarranted "penalty pay" (App. 26a-27a).

[10] *Clinchfield Coal* was brought under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. In *Clinchfield Coal* the Fourth Circuit held that "[w]here . . . the arbitrator fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw its essence from the contract" and should be set aside. 720 F.2d at 1369.

to the instant case, *Clinchfield Coal*, *supra*, requires that the panel's decision be vacated" (App. 9a).[11]

Judge Ervin, the author of *Clinchfield Coal*, dissented. He emphasized that by affirming the district court's judgment the panel majority had placed itself in direct conflict with *Skidmore* v. *Consolidated Rail Corp.*, 619 F.2d 157 (2d Cir. 1979), *cert. denied*, 449 U.S. 854 (1980). In *Skidmore* the Second Circuit "rejected the claim that 'the NRAB lacks jurisdiction to *misinterpret* the bargaining agreement'," (App. 13a (*quoting Skidmore*, 619 F.2d at 159)), and noted that "it is specious to say that the NRAB lacks jurisdiction to make mistakes" (App. 13a). Here, as in *Skidmore*, Judge Ervin wrote, "no obvious mistake was made . . . Even if it were, it would not affect the jurisdiction of the NRAB" (App. 13a).

Judge Ervin then criticized the majority's and the district court's analysis of the contract language on substantive, procedural and factual grounds. Substantively, it was incorrect for the courts to provide *de novo* review of the Board's contract interpretation. This is, he said, "exactly what the Supreme Court and distinguished commentators have repeatedly warned against: attempts by the federal judiciary to interpret labor contracts in near-complete ignorance of the 'common law of the particular plant or industry'" (App. 13a-14a). Procedurally, the panel majority's reliance on Rule 1 was erroneous because "the parties never contemplated that Rule 1 controlled this case until the railroad reached the district court stage" (App. 14a). Hence, the issue was "not reviewable, because waived below" (App. 14a-15a). Finally, Judge Ervin found no basis for the panel majority's glib reading of Rule 1. The dispute calls for "a close textual examination of Rule 1 . . . . [and] is certainly not the sort of argument that could be resolved by

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[11] In view of its ruling on this question, the court of appeals expressly declined to reach the district court's holding on the penalty pay issue (App. 9a).

the 'cursory reading' that the majority mentions" (App. 15a). "To affirm the district court judge in this case," he concluded, "requires this court to say that the Fishgold panel went *beyond its jurisdiction* in not addressing an issue that arguably is not compelling and was not properly presented to it" (App. 16a).

REASONS FOR GRANTING THE WRIT

Judicial review of NRAB awards has repeatedly been characterized as "'among the narrowest known to the law.'" *E.g., Atchison, Topeka & Santa Fe Railway* v. *Buell*, 107 S.Ct. 1410, 1414 (1987) (*quoting Union Pacific Railroad* v. *Sheehan*, 439 U.S. 89, 91 (1978) (per curiam)). The Railway Labor Act provides that awards shall be "final and binding" and "conclusive on the parties" and may be set aside by the courts only on one of three specific, narrow grounds. 45 U.S.C. § 153, First (m), (q). One of these grounds is the "failure of the order to conform, or confine itself, to matters within the scope of [the Board's] jurisdiction." 45 U.S.C. § 153, First(q).[12]

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[12] The other grounds for setting aside awards are failure of the Board to comply with Railway Labor Act procedures, and fraud or corruption by a member of the NRAB division making the order. 45 U.S.C. § 153, First(q). Judicial challenges are almost invariably based on the assertion that the Board exceeded its jurisdiction. *See generally* Annotation, *Judicial Enforcement or Review of Decisions of National Railroad Adjustment Board Under 45 U.S.C. § 153 First, (p) and (q), or of Special Adjustment Board Under 45 U.S.C. § 153 Second*, 9 A.L.R. Fed. 533 (1971).

The awards of public law boards and airline system boards of adjustment are also subject to the narrow scope of review of section 3, First(q). *See Brotherhood of Locomotive Engineers* v. *St. Louis Southwestern Railway*, 757 F.2d 656, 660-61 (5th Cir. 1985); *Jones* v. *St. Louis-San Francisco Railway*, 728 F.2d 257, 262 n.4 (6th Cir. 1984) (citing cases); *Hunt* v. *Northwest Airlines*, 600 F.2d 176, 178 (8th Cir.) (citing *International Association of Machinists* v. *Central Airlines*, 372 U.S. 682 (1963)), *cert. denied*, 444 U.S. 946 (1979).

In *Sheehan*, this Court, drawing heavily on its earlier Railway Labor Act decisions, held that in actions to set aside Adjustment Board awards the "dispositive question" is "whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review." 439 U.S. at 93. The Act "unequivocally states that the 'findings and order of the [Adjustment Board] shall be conclusive on the parties' and may be set aside only for the three reasons specified therein. We have," the Court said, "time and again emphasized that this statutory language means just what it says." *Id.*

This petition should be granted so that the Court can resolve the conflict between the decision below and: (a) the decisions of the other courts of appeals interpreting and applying the jurisdictional provision of section 3, First(q), and (b) the opinions of this Court dealing with judicial review of Adjustment Board awards. This case also provides the Court with the opportunity to assist litigants and the lower courts by definitively construing the jurisdictional provision of section 3, First (q).

I

Expressly holding that it found "no error" in the opinion of the district court, the court below failed even to comment on, much less criticize, that court's *de novo* review of the question of contract interpretation submitted by the parties to the Adjustment Board. While briefly incanting *Sheehan*, the panel majority devoted the far greater part of its analysis to trying to demonstrate that the Fishgold panel exceeded its jurisdiction by failing to explain why certain contract language did not support the Carrier's position. The court thereby placed itself in conflict with numerous other courts of appeals in at least three ways.

A. The court below set aside the Adjustment Board's order because of the perceived incompleteness of the opin-

ion accompanying the order (App. 8a-9a). Other courts, relying on this Court's teachings, have held that the Adjustment Board has " 'no obligation to the Court to give . . . reasons for an award.' " *Eastern Air Lines* v. *Transport Workers Union*, 580 F.2d 169, 173 (5th Cir. 1978) (*quoting United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-98 (1960)); *Rossi* v. *Trans World Airlines*, 507 F.2d 404, 405 (9th Cir. 1974) (per curiam); *see also Bernhardt* v. *Polygraphic Co. of America*, 350 U.S. 198, 203 (1956) (arbitrators "need not give their reasons for their results").[13] In *Eastern Air Lines*, for example, the Fifth Circuit reversed the judgment of the district court setting aside an award because the Board—like the Fishgold panel—had failed in its opinion to "construe and apply" the contractual provisions which the carrier argued were controlling. *See* 580 F.2d at 171-73.

B. The panel majority also apparently based its holding on the view, more fully elaborated by the district court following its *de novo* review of the contract, that the Adjustment Board erroneously interpreted the parties' agreement. As Judge Ervin pointed out in dissent, this view squarely conflicts with the holding in *Skidmore* v. *Consolidated Rail Corp.*, 619 F.2d 157 (2d Cir. 1979) (per curiam). *Skidmore* articulated and applied a rule widely followed by other courts of appeals when it dismissed as "specious" the "theory that the NRAB is without jurisdiction to make mistakes, with its corollary that in spite of the limiting language of § 153 First(q) a party is entitled to virtually *de novo* review whenever he asserts error by the NRAB." *Id.* at 159. *Accord Hill*

[13] This rule is supported by the plain language of the Act. Section 3, First(q) provides that Board orders may be set aside "for failure *of the order* to conform, or confine itself, to matters within the scope of the division's jurisdiction" (emphasis added). Nothing in the Act even requires the issuance of an opinion in conjunction with an award.

v. *Norfolk & Western Railway*, 814 F.2d 1192, 1194-95 (7th Cir. 1987); *Armstrong Lodge No. 762* v. *Union Pacific Railroad*, 783 F.2d 131, 135 (8th Cir. 1986); *Chernak* v. *Southwest Airlines*, 778 F.2d 578, 581 (10th Cir. 1985); *Loveless* v. *Eastern Air Lines*, 681 F.2d 1272, 1280 (11th Cir. 1982). "[T]he fundamental point," Judge Posner wrote in *Hill*, is that "the judicial function in arbitration cases is at an end when the court is satisfied that the arbitrators were interpreting the contract rather than doing something else. The correctness of their interpretation is irrelevant." 814 F.2d at 1197.

C. Viewing the panel majority's decision in another light, it was not so much correcting a perceived error in the Adjustment Board's interpretation of the agreement as resolving an arguable ambiguity in the Board's opinion in favor of the Carrier and against the award. While acknowledging that the Fishgold panel was aware of the presence of Rule 1 in the dispute (App. 6a, 8a), the court assumed that because the Fishgold opinions did not "discuss" the rule that the Board had necessarily failed to weigh Rule 1 in its analysis. In other words, the court of appeals relied upon an ambiguity in the Board's opinion to set aside the award. Once again, the court declined to apply a theory articulated and applied by other courts—that ambiguities in the opinion accompanying an arbitration award are not grounds for setting aside the award. *See Walsh* v. *Union Pacific Railroad*, 803 F.2d 412, 414 (8th Cir. 1986) (*citing United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. at 597-98), *cert. denied*, 107 S.Ct. 3213 (1987); *see also W.R. Grace & Co.* v. *Local Union 759, United Rubber Workers*, 461 U.S. 757, 764 (1983).[14]

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[14] Section 3, First(q) authorizes the reviewing court to remand a case to the Adjustment Board. However, this procedure is ordinarily used only when the Board's *award* is too ambiguous to be enforced. *See United Transportation Union* v. *Southern Pacific Transportation Co.*, 529 F.2d 691, 693 (5th Cir. 1976); *cf. Trans-*

II

Although this Court has not yet construed the jurisdictional provision of Section 3, First(q), the panel majority's application of the statute also conflicts with a long line of the Court's Railway Labor Act decisions. These cases firmly establish the Adjustment Board's special expertise in the interpretation of railway labor contracts, the finality of Board awards, and the concomitantly limited scope of judicial review. The legislative history of the Act's 1966 amendments (which included section 3, First(q)) similarly makes clear the intent of Congress to limit judicial review of Board awards to the narrowest possible grounds.

A. In *Gunther* v. *San Diego & Arizona Eastern Railway*, 382 U.S. 257 (1965), the Adjustment Board reinstated an employee, basing its award largely on the past practice of the parties. The district court set aside the award and the court of appeals affirmed; both courts concluded that "there were no express or implied provisions in the collective bargaining contract which . . . limited in any way" the Carrier's right to discharge the employee. *Id.* at 260. This Court reversed, resting its decision on the special competence of the Board and its Congressionally-mandated role in resolving contract interpretation questions. The Court explained that the

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portation-Communication Employees Union v. *Union Pacific Railroad*, 385 U.S. 157, 165-66 & n.4 (1966) (discussing remand under the Act where an indispensable party has failed to participate in the arbitration proceedings).

In this case the Yardmasters have not asserted a contractual claim to the work at issue and although named as an interested third party in the proceedings conducted by the Kasher panel elected not to participate (App. 32a). The Yardmasters also failed to make any claim to the work involved in the cases submitted to the Fishgold panel (App. 32a). Consequently, the Yardmasters are not indispensable parties to this dispute under the analysis of *Transportation-Communication.*

Board, "composed equally of representatives of management and labor is peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world. Its membership is in daily contact with workers and employers, and knows the industry's language, customs, and practices." 382 U.S. at 261 (*citing Slocum* v. *Delaware, Lackawanna & Western Railway*, 339 U.S. 239, 243-44 (1950)).[15]

The following year, in *Transportation-Communication Employees Union* v. *Union Pacific Railroad*, 385 U.S. 157 (1966), a case—like this one—involving a dispute over work assignments, the Court again recognized that the Board's expertise in railway labor matters renders it uniquely qualified to engage in the highly specialized task of resolving contract interpretation disputes. The Court observed that railroad labor contracts—like labor contracts in other industries but unlike the run of contracts generally—constitute " 'a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate' " and " 'call into being a new common law—the common law [the] particular industry.' " *Id.* at 161 (*quoting United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960)). "In

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[15] The Adjustment Board's expertise is heightened by the fact that each of its four divisions has statutorily prescribed jurisdiction over certain railroad crafts. *See* 45 U.S.C. § 153, First(h).

On the special expertise of the NRAB, *see generally* Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567 (1937). Professor Garrison, an experienced railroad arbitrator, notes "the subtle mix of human, economic and legal problems which inhere in most of the cases" presented to the Board. *Id.* at 586. He emphasizes, however, that the Board (unlike a court) is concerned with "cold-blooded" contract interpretation, not with doing "equity." The Board leaves any unwanted results to be addressed and resolved by the same processes of collective bargaining which gave rise to the contract in the first instance. *Id.* at 583, 590-91.

The Fishgold panel reminded the parties of this rule in its opinion. *See* note 5, *supra*.

order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. This is particularly true when the agreement is resorted to for the purpose of settling a jurisdictional dispute over work assignments." *Id.*

B. In numerous other Railway Labor Act cases the Court has concluded that finality of Board awards was, from the outset, an integral part of the statutory scheme. As shown by the legislative history of the 1934 amendments which created the NRAB, finality of awards was the result of a major concession by railroad labor, which gave up the right to strike over contract interpretation disputes in order that the Adjustment Board be empowered finally to resolve them. The labor spokesman before the Congressional committees formulating the legislation "made it crystal clear that an essential feature of the proposal was that Board awards . . . were to be final and binding . . . . The employees were willing to give up their remedies outside of the statute provided that a workable and binding statutory scheme was established to settle grievances." *Union Pacific Railroad* v. *Price*, 360 U.S. 601, 613 (1959). According to the principal draftsman of the legislation, this "very important concession" by railroad labor was "the most important part of the bill". *Railway Labor Act Amendments: Hearings on H.R. 7650 Before the House Committee on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 47 (1934) (statement of Joseph B. Eastman, Federal Coordinator of Transportation) (quoted in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad*, 353 U.S. 30, 37 (1957)). Accordingly, even prior to the 1966 amendments it was clear that Congress intended " 'to foreclose litigation in the courts over grievances submitted to and disposed of by the Board.' " *Gunther*, 382 U.S. at 263 (*quoting Union Pacific Railroad* v. *Price*,

360 U.S. at 616). As *Gunther* stated in no uncertain terms, "[t]his Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board." *Id.*

C. The legal theories which are the basis of the Court's pre-1966 decisions are consistent with not only the language, but also the legislative history, of the 1966 amendments. Like *Gunther* (decided in 1965), one of the principal purposes of this legislation was to end the hitherto routine challenges to Board awards which threatened to undermine their finality. *See* S. Rep. No. 1201, 89th Cong., 2d Sess. 1-6 (1966). The amendments were intended to limit judicial review of NRAB awards "to those grounds commonly provided for review of arbitration awards", *id.* at 3, a goal embodied in the new language of section 3, First(p) and (q). Congress considered but declined to adopt a proposed amendment which would have included as a ground for setting aside an award " 'arbitrariness or capriciousness' on the part of the Board." *Id.* at 3. The drafters rejected this proposal because of their "concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed as being arbitrary or capricious." *Id.*

There is nothing in the opinion of the court below which suggests that it was even conscious of, much less guided by, these bedrock principles of railway labor law. Not surprisingly, both its reasoning and its result conflict directly with the letter of the Act, its legislative history, and this Court's Railway Labor Act decisions.

III

Notwithstanding this legislative history and the unmistakable import of the Court's holdings, the decision of the court of appeals that the Fishgold panel exceeded its jurisdiction may be at least partly attributable to the

absence of any direct guidance from this Court on the meaning of the jurisdictional provision of section 3, First (q). *Gunther*, decided just before the amendments were enacted, reversed a judgment setting aside an arbitration award where it could not be said that the award was "wholly baseless and completely without reason." 382 U.S. at 261. In the ensuing decades the lower courts have sought to establish the relationship between *Gunther* and the jurisdictional provision.

In *Brotherhood of Railroad Trainmen* v. *Central of Georgia Railway*, 415 F.2d 403 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970), for example, the Fifth Circuit considered whether "the rule in *Gunther*, which forecloses even a glimpse at the merits, now applies to all [Board] awards." *Id.* at 411. It concluded that the proper jurisdictional inquiry is whether the Adjustment Board's award is " 'actually and undisputedly without foundation in reason or fact,' " *id.* at 414 (*quoting* S. Rep. No. 1201, 89th Cong., 2d Sess. 3 (1966)), or, as this Court said in *Gunther*, "whether 'the Board's interpretation was wholly baseless and without reason,' " *id.* (*quoting Gunther*, 382 U.S. at 261). Several courts have followed *Central of Georgia* and equated the jurisdictional inquiry of section 3, First(q) with the language of *Gunther* or the Senate Report. *See Schneider* v. *Southern Railway*, 822 F.2d 22, 24 (6th Cir. 1987); *International Association of Machinists and Aerospace Workers* v. *Southern Pacific Transportation Co.*, 626 F.2d 715, 717 (9th Cir. 1980); *Brotherhood of Railway, Airline and Steamship Clerks* v. *Kansas City Terminal Railway*, 587 F.2d 903, 906-07 & n.3 (8th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).[16] Other courts have noted but de-

[16] Until now, it had been the rule in the Fourth Circuit that "*Gunther* precludes judicial reexamination of the merits of a Board award." *Brotherhood of Railway, Airline and Steamship Clerks* v. *Southern Railway*, 380 F.2d 59, 67 (4th Cir.), *cert. denied*, 389 U.S. 958 (1967).

clined definitively to resolve this critical question of statutory construction. *See Woodrum* v. *Southern Railway*, 750 F.2d 876, 881 (11th Cir.), *cert. denied*, 474 U.S. 821 (1985); *Loveless* v. *Eastern Air Lines*, 681 F.2d at 1276; *see also Barrett* v. *Manufacturers Railway*, 453 F.2d 1305, 1306 n.2 (8th Cir. 1972). *See generally* H. Lustgarten, *Principles of Railroad and Airline Labor Law* 109-10 (1984).

The court of appeals would have been less likely to reach the result it did—based on its own non-Railway Labor Act decision in *Clinchfield Coal* and in conflict with the case law of the other courts of appeals—if it had been bound by a decision of this Court definitively construing the dispositive statutory language.[17] Such a decision will be equally helpful to the other lower courts as they continue to deal with this recurring and important question of federal labor law.

IV

A. As is demonstrated by the many lower court opinions seeking to give content to the jurisdictional provision of section 3, First(q), *see* discussion *supra* at 17-18, the importance of the question of statutory construction presented extends far beyond this case. It is, moreover, a question of equally pressing concern to both railroads and airlines on the one hand, and their employees on the other, since the 1966 amendments equalized the rights of labor and management to seek to set aside awards.[18]

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[17] *Clinchfield Coal* illustrates, in another labor law context, the Fourth Circuit's inclination to encourage *de novo* review of arbitration awards and to depart from settled principles of judicial deference to arbitrators' decisions. *Cf. W.R. Grace*, 461 U.S. at 764; *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 262 U.S. at 596-98.

[18] The same standards of judicial review also apply in actions to enforce awards brought under section 3, First(p), 45 U.S.C. § 153, First(p).

Under the broad venue provisions of the Act, actions to set aside awards can be brought in any judicial district through which the carrier operates. Section 3, First (p), (q), 45 U.S.C. § 153, First (p), (q). Consequently, any party seeking to set aside an award can take full advantage of the Fourth Circuit's new, singularly expansive standard for judicial review of Board awards if the carrier operates in that circuit.[19] If this case remains the law, the award will be set aside if the arbitrator has failed to discuss in his or her opinion any contract provision which might arguably require a different result.

B. There is a large and increasing number of arbitration decisions subject to judicial review under the Act.[20] In view of these increasing numbers, two ominous trends make imperative the need for guidance from this Court on the meaning of the jurisdictional provision.[21]

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[19] The court below directed that its opinion be unpublished. However, the court's internal operating procedures provide that an unpublished opinion may be cited "for the purpose of establishing res judicata, estoppel or law of the case", and may also be relied upon if counsel believes that it has "precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well." Fourth Circuit Internal Operating Procedure 36.5. Of course, nothing precludes counsel for any carrier—or union—from utilizing the Fourth Circuit's opinion in actions to set aside awards brought in any other court.

[20] The following are the numbers of such awards rendered in the last four years:

YEAR	
1986	6771
1985	6815
1984	5853
1983	4524

Source: Statistical compilation by the National Mediation Board, September 1987.

[21] As is explained in note 12, *supra*, judicial challenges are almost invariably based on the assertion that the Board exceeded its jurisdiction.

One trend is that increasing numbers of jurisdictional challenges of Board awards are being brought. As the Seventh Circuit has only recently admonished lawyers, "[t]his court has been plagued by groundless lawsuits seeking to overturn arbitration awards. . . . The promise of arbitration is spoiled if parties disappointed by its results can delay the conclusion of the proceeding by groundless litigation in the district court followed by groundless appeal to this court." *Hill* v. *Norfolk & Westtern Railway*, 814 F.2d at 1203.

The General Counsel of the National Mediation Board similarly has warned that the finality of arbitration awards has been threatened by lawyers' conduct, as well as by increasingly expansive judicial review. According to General Counsel Etters,

> [I]n a distinct portion of the cases the parties' legal counsel may be pursuing approaches not consonant with the policies of the Act. Regrettably, the lower courts have in some cases engaged in judicial adventurism by accepting jurisdiction of matters not properly within their very limited review powers. This, of course, further encourages the invalid concept that the grievance and arbitration process is but an interim stage in an extended adjudication scheme with an inevitable probability of court litigation.

Presentation of General Counsel Ronald M. Etters at National Mediation Board/Society of Professionals in Dispute Resolution Conference, October 16, 1985, at pp. 4-5.

Like General Counsel Etters, commentators on the Act have noticed a parallel trend in judicial decisions at the district court level "to extrapolate from a purely 'jurisdictional' standard to the identification of certain limited substantive grounds for vacation of an arbitral award." ABA Committee on Railway and Airline Labor Law, *Survey of Developments in Railway and Airline Labor Law*, 2 The Labor Lawyer 424, 432 (1986) (citing cases). This trend—epitomized by the analysis of the

district court here, *see* p. 6, *supra*—runs directly counter to the teaching of this Court in *Sheehan* that "judicially created challenges to [Board] awards must fail." *Henry* v. *Delta Air Lines*, 759 F.2d 870, 873 (11th Cir. 1985).

The district court's unabashed *de novo* review in this case and the Fourth Circuit's affirmance on novel grounds can do nothing but foster such a proliferation of litigation. There is thus a pressing need for the Court to use this opportunity to reaffirm its earlier holdings and squarely to apply them to the jurisdictional provision of section 3, First(q). The alternative, "[t]o permit judicial review of every case where the losing party disagrees with the arbitrator's application of the collective bargaining agreement[,] would frustrate Congressional efforts to promote stability in labor management relationships and would be in violation of the mandate of . . . *Sheehan*." *Chernak* v. *Southwest Airlines*, 778 F.2d at 581.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November 12, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2547

BALTIMORE AND OHIO RAILROAD COMPANY,
Plaintiff-Appellee

versus

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYERS: B. M. HILL; S. J. SWISHER; R. L. SHEPHERD; J. M. EMERICK; K. G. ROTRUCK; C. S. VAN METER; D. W. HANEKAMP; T. L. HOUSEHOLDER; R. A. SHROUT; J. K. HUNT; G. H. MECHEM; R. R. WAGNER; M. E. ROBERTS; G. C. FISHER; P. G. LILLER; E. E. GAUS; J. W. HEMMIS; C. M. BECHMAN; R. D. FOGLE; V. N. TEAGARDEN; D. W. LAUGHLIN; T. D. RILEY; N. R. CHESTER; E. J. STALEY; W. DORSEY; G. HENRY; M. H. REDMAN; H. FRY; D. HENDERSHOT; D. C. WENTZ; L. C. BRANNON, JR.; A. G. BRUCHSCH; C. W. BARR; C. E. STURDIVANT; R. C. CONRAD; R. H. LEE; A. A. WOMACK; R. T. CARLETTI; J. L. DARDEN; W. E. TABELING; P. E. WRIGHT; H. W. HARVEY; C. J. HEFFLEY; C. I. RUNION; R. E. NEIDERMEIER; H. L. HAUPRICHT; R. L. HASTINGS; HELEN RINKER; J. M. UNDERWOOD; J. RUSYNYK; G. H. HILTBURNER; G. H. BURSIEL; M. A. KING; A. E. RUNION, JR.; L. D. DAWSON; L. J. ONEY; R. J. NEIDERMEIER; F. N. MCQUOWN; P. E. CLEMONS; J. C. BEEKMAN,
Defendants-Appellants

and

RAILROAD YARDMASTERS OF AMERICA,
Defendant

Appeal from the United States District Court
for the District of Maryland, at Baltimore
J. Frederick Motz, District Judge
(CA. No. 84-3140-JFM)

Argued: December 9, 1986 Decided: March 9, 1987

Before ERVIN, CHAPMAN and WILKINSON, Circuit Judges.

Edgar N. James (Joseph Guerrieri, Jr.; Guerrieri & Sweeney on brief) for appellants; Daniel Christopher Ohly (H. Russell Smouse; Melnicove, Kaufman, Weiner, Smouse & Garbis, P.A.; Thomas L. Samuel; Nicholas S. Yovanovic, Seaboard System Railroad on brief) for appellees.

CHAPMAN, Circuit Judge:

This case grows out of a dispute between the B&O Railroad and the Brotherhood of Railway, Airline, and Steamship Clerks. (BRAC) At issue is whether B&O has violated the collective bargaining agreement by permitting yardmasters to tear off messages printed by teletype. The National Railroad Adjustment Board (NRAB) panel which heard this matter determined that this practice was contrary to the collective bargaining agreement and fined B&O $3,000,000 for past violations. B&O sought review of this decision in the district court, which vacated the panel's decision on the grounds that the NRAB panel had exceeded its jurisdiction by ignoring critical language in the collective bargaining agreement. BRAC has appealed, but finding no error, we affirm.

I.

For some fifty years B&O has used teletype machines at various locations within its system. These machines have been operated by members of the Telegraphers Union (Telegraphers) since 1945, when the Telegraphers and B&O entered into a Memorandum of Understanding which brought the operation of teletype machines within the scope of the Telegraphers collective bargaining agreement.

Contemporaneously, B&O began installing these teletype machines in some sales offices and yard offices, where they were used by employees who were not union members to transmit messages to relay offices within the same terminal and city. Union members in the relay offices would then retransmit these messages to other terminals in other cities. A dispute about this practice arose, and in 1947 an Interpretation of the 1945 Memorandum of Understanding was executed by B&O and the Telegraphers. The Interpretation provided that the Memorandum did not extend to intra-city communications by teletype machines at those locations where communications had previously been conducted by telephone or messenger. The Memorandum and Interpretation were included in Article 31 of the collective bargaining agreement executed between B&O and the union in 1948.

Since 1948, it has been the practice of B&O to allow employees who are not union members to operate teletype machines in accordance with the Interpretation. Also, in 1948, B&O began using teletype machines to transmit switch list from the yard office to yardmasters at each end of the yard. The yardmasters had to tear the list off the teletype machines in order to use them. Until the instant action, this practice has never been challenged. In 1955, Article 31 was revised and reappeared as Article 36. Though Article 36 did not mention the 1947 Interpretation, both B&O and the union continued to abide by the terms of the Interpretation.

In 1971, B&O began replacing the older teletype machines with newer models that used multi-part paper. This required that the yardmaster separate the various copies after tearing the switch list from the machine. The entire procedure consumed but a few seconds, totaling less than five minutes per day. Additionally, in 1971, the Telegraphers Union merged into BRAC. As a result of this merger, the railroad industry entered into a National Mediation Agreement. The Agreement allowed the new union to make work assignments interchangeable between Clerks and Telegraphers. It also permitted BRAC, the surviving union, to select the provisions it preferred from the merged unions' collective bargaining agreements, so long as no change was made in the substance of the provisions selected. BRAC had complete control over which provisions it kept and which it rejected.

In fashioning its new collective bargaining agreement, BRAC retained Article 36 of the Telegraphers' collective bargaining agreement, though not in its entirety. Those paragraphs related to the obsolete Morse telegraphy equipment were abandoned as were paragraphs which placed restrictions on BRAC members, and the "de minimis" provisions of Article 36. The de minimis provisions were rendered unnecessary because BRAC adopted the Scope Rule from the old BRAC collective bargaining agreement which contained general de minimis provisions.

In 1974, B&O opened Terminal Service Centers at various locations within its system. As a result, a substantial number of employees, including clerical personnel, were moved from yards into centralized data process offices. Although the centralization created many new clerical positions at these Centers, it left the yardmasters alone in their offices. Printers were placed in more yardmasters' offices to permit them to receive switch list transmitted by clerical employees at the Centers. These

transmissions lie at the heart of this litigation. In every alleged violation at issue here, the clerical positions in the yardmasters' offices had been abolished and those clerical employees were transferred to the Terminal Service Centers. The transmissions complained of were all intra-city communications.

In 1975, BRAC began complaining that B&O was violating Rules 1 and 67 of the collective bargaining agreement by permitting yardmasters to tear switch lists off the printers and separate the copies. When the parties were unable to resolve this dispute, BRAC petitioned the NRAB for review. Before the panel, B&O sought to justify the challenged practice on the basis of Rule 1, the Scope Rule, and Rule 67, the modern progeny of the 1945 Memorandum of Understanding. Rule 1 reads, in pertinent part:

> (b) When the assignment of clerical work in an office, station, warehouse, freight house, storehouse, or yard, occurring within a spread of ten (10) hours from the time such clerical work begins, is made to more than one (1) employee not classified as a clerk, the total time devoted to such work by all such employees at a facility specified herein shall not exceed four (4) hours per day.
>
> * * * *
>
> (c) When a position covered by this Agreement is abolished, the work assigned to the same which remains to be performed will be reassigned in accordance with the following:
>
> * * * *
>
> (c) (2) In the event no position under this Agreement exists at the location where the work of the abolished position or positions is to be performed, then it may be performed by a Yardmaster, Foreman or other supervisory employee, provided that less than four (4) hours work per day of the abol-

> ished position or positions remains to be performed; and further provided that such work is incident to the duties of a Yardmaster, Foreman or other supervisory employee.

B&O argues that Rule 1(b) permits its yardmasters to perform clerical work at the yard if the work occupies fewer than four hours of a ten hour time period. B&O asserts that Rule 1(c)(2) permits a yardmaster to spend up to four hours per day on clerical work if the clerical positions at the yard have been abolished. B&O also argues that its practice was permissable under Rule 67, which reads in pertinent part:

> Work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and correction of errors, shall be performed by the employees covered by this Agreement.

Though this section of Rule 67 clearly includes the work performed within the scope of the collective bargaining agreement, B&O argued that its practice was permissible under the 1947 Interpretation, because the Interpretation governs Rule 67.

The NRAB panel disagreed and decided that because Rule 67 had not been adopted unchanged, the past interpretations of the Rule, including the 1947 Interpretation, were no longer binding. Although the panel decision acknowledges that B&O had relied upon the Scope Rule to justify its practices, the panel failed to discuss the provisions of the Scope Rule or its applicability to the instant dispute. The panel relied upon the "Call Rule", Rule 8, and awarded three hours of pay for every day that the yardmasters tore a switch list off teletypes. The sum awarded for past violations totaled $3,000,000. At the same time, another NRAB panel heard identical claims brought against B&O by its clerical employees at the Chicago Terminal. This second panel, presided over

by Referee Silagi, found that the challenged practices were permissible because they were within the exceptions contained in the Scope Rule, and because they were in accord with the parties dealings for twenty-five years.

Dissatisfied with the panel decision in the instant case, B&O sought review in the United States District Court for the District of Maryland. The district court relied upon the decision of this court in *Clinchfield Coal Co. v. District 28 UNW*, 720 F.2d 1368 (4th Cir. 1983), in holding that the NRAB panel had exceeded its jurisdiction by ignoring the provisions of the Scope Rule and, thereby, effectively rewritten the collective bargaining agreement. The district court also held that the panel had exceed its jurisdiction by awarding "penalty pay" in the absence of either wilful or wanton misconduct, or a provision for penalty pay in the collective bargaining agreement. This appeal followed.

II.

The Supreme Court has stated that the scope of review of an NRAB decision is among the narrowest known to law. *Union Pacific Railway Co. v. Sheehan*, 439 U.S. 89 (1978). Indeed, 45 U.S.C. § 151 prohibits a court from setting aside an NRAB award unless the NRAB has failed to comply with the requirements of the Railway Labor Act, the NRAB has failed to confine itself to the scope of its jurisdiction in interpreting the provisions of the collective bargaining agreement, or a member of the NRAB panel making the award is guilty of fraud or corruption. As this court has held, the parties may not relitigate, issues which have already been decided by the NRAB. *Radin v. U.S.*, 699 F.2d 681 (4th Cir. 1983).

That the scope of review is highly restricted, however, does not mean that courts may never set aside an NRAB award. Awards may be set aside if they are wholly baseless and completely without reason, *Gunther v. San Diego and Arizona Railway Co.*, 383 U.S. 257 (1965);

if they are actually and undisputedly without foundation and reason or fact, *Brotherhood of Railroad Trainmen v. Central Georgia Railway Co.*, 415 F.2d 403 (5th Cir. 1969); or if the NRAB decision fails to draw its essence from the collective bargaining agreement, *International Association of MACH v. So. Pac. Transp.*, 626 F.2d 715 (9th Cir. 1980); *BRAC v. Kansas City Terminal Railway Co.*, 587 F.2d 903 (8th Cir. 1978); *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970).

The NRAB exceeds its jurisdiction when there is manifest disregard of the collective bargaining agreement, *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969), or when an award fails to take into account any existing common law of the particular plant or industry, *Norfolk Shipping & Dry Dock v. Local No. 684*, 671 F.2d 797 (4th Cir. 1982). A collective bargaining agreement is more than a contract, it is a generalized code to govern the myriad cases which the draftsman cannot anticipate. *United Steel Workers of America v. Warrrier and Gulf N. Co.*, 363 U.S. 574 (1960). This generalized focus does not however, permit an arbitrator to rewrite the provisions of the collective bargaining agreement. *See, e.g., Mistletoe Express Service v. Motor Expressmens Union*, 566 F.2d 692 (10th Cir. 1977); *W.R. Grace and Co. v. Local Union 759*, 652 F.2d 1248 (5th Cir. 1981). Thus, this court has held that where an arbitrator fails to discuss, in his decision, critical contract terminology, which might reasonably require the opposite result, the award cannot be considered to draw its essence from the contract. *Clinchfield Coal v. District 28, UMW*, 720 F.2d 1365 (4th Cir. 1983).

In the instant case, the NRAB panel noted that B&O had raised the Scope Rule issue but then the panel failed to provide any discussion or analysis of that issue. Even a cursory reading of the relevant sections of the Scope

Rule would lead the reader to believe that those practices which BRAC now challenges are completely proper under the collective bargaining agreement. Because the NRAB panel has provided no explanation of either the Scope Rule provisions at issue here, or their applicability to the instant case, *Clinchfield Coal, Supra,* requires that the panel's decision be vacated.

The district court also vacated the monetary award on separate grounds, holding that it was penalty pay because the sum awarded was so excessive in relation to the work performed that it could not be characterized as compensatory, and that under *Norfolk and Western Railway Co. v. BRAC,* 657 F.2d 596 (4th Cir. 1981), penalty pay is proper only if the employer has been guilty of wilful or wanton misconduct or if the collective bargaining agreement provides for penalty pay. Because *Clinchfield Coal* requires that the NRAB panel's decision in the instant case be vacated, we need not reach, and therefore, do not decide the issue of penalty pay. For the reasons foregoing, the decision of the district court is

AFFIRMED.

ERVIN, Circuit Judge, dissenting

The district court judge and the majority correctly state the standard of review that is to guide us in cases such as this: it is "among the narrowest known to the law." *E.g., Norfolk & Western Railway Co. v. Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees*, 657 F.2d 596, 599 (1981). This is hardly a contestable issue since the Supreme Court has stated that the Railway Labor Act "means what it says" when it provides that a final order of NRAB is conclusive on the parties and can be set aside only for one of the three reasons provided in the statute: (1) failure of NRAB to comply with the Act itself; (2) "failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction"; or (3) fraud or corruption. 45 U.S.C. § 153 First (q) (1982). *See Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 93 (1978) (per curiam) ("Only upon one or more of these bases may a court set aside an order of the Adjustment Board. . . . the Adjustment Board certainly was acting within its jurisdiction and in conformity with the . . . Act. . . . We have time and again emphasized that this statutory language means just what it says."); *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 325 (1972) ("A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding . . . He is limited to the judicial review . . . that the Act itself provides."); *Gunther v. San Diego & Arizona Eastern Railway Co.*, 382 U.S. 257 (1965).

The authority for the proposition that courts may nevertheless set aside an NRAB award is more apocryphal than the majority indicates. For example, in *Gunther*, cited by the majority, the plaintiff employee was removed from his job as a railroad fireman due to reports from the railroad's physicians that he was not

physically qualified to continue to work. The Adjustment Board granted the plaintiff's claim for reinstatement and back pay after the Board appointed a panel of doctors who found the plaintiff physically qualified. The Board construed the plaintiff's contract to require his continued employment priority as a senior employee while physically fit. The railroad refused to comply and the plaintiff sued in the United States District Court for the Southern District of California. That district court refused to grant relief, holding the award erroneous. The Ninth Circuit affirmed. *See F. J. Gunther v. San Diego & Arizona Eastern Railway Co.*, 336 F.2d 543 (9th Cir. 1964).

The Supreme Court reversed in no uncertain terms. Justice Black wrote:

> The District Court found nothing in the agreements restricting the railroad's right to remove its employees for physical disability upon the good-faith findings of disability by its own physicians. Certainly it cannot be said that the Board interpretation was wholly baseless and completely without reason. We hold that the District Court and the Court of Appeals as well went well beyond their province in rejecting the Adjustment Board's interpretation of this railroad collective bargaining agreement. *As hereafter pointed out, Congress, in the Railway Labor Act, invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise in this field. . . . This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board.*

382 U.S. at 261-63 (emphasis added).

Of the four Railway Labor Act cases cited by the majority and relied on by the district court judge, three absolutely refused to tamper with an arbitration board's finding under the review provisions noted above; their language concerning an NRAB decision's failure to "draw its essence from the collective bargaining agreement" was purely dicta. The dictum in each case seems to have had its source in the fourth of the four cases, *Brotherhood of Railway Trainmen v. Central of Georgia Railway Co.*, 415 F.2d 403 (5th Cir.), *cert. denied*, 396 U.S. 1008 (1969). There, also, the court of appeals reversed a district court's holding that ran contrary to a Board award. The opinion, by Judge Wisdom, carefully parses the legislative history of the appeals provision for Board awards. The court said:

> To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his authority. When he is no longer carrying out the agreement or when his position cannot be considered in any way rational, he has exceeded his jurisdiction. The requirement that the result of arbitration have "foundation in reason or fact" means that the award must, in some logical way, be derived from the wording or purpose of the contract.

415 F.2d at 412. The fifth circuit concluded that the district court had properly inquired into whether the awards were "actually and indisputably without foundation in reason or fact." The court of appeals found, however, that the Board was not outside its jurisdiction, in the sense explained above, in awarding penalty pay, and reversed the district court's decision as to two awards. As to one other award, the court of appeals found that the Board was outside its jurisdiction, because it had

improperly calculated the award based on its own formula. "We think that while the Board's announced *principle* for determining the sum due to Short was reasonable enough to withstand setting aside, its *calculations* led to a wholly baseless result." 415 F.2d at 417. The fifth circuit remanded to the Board for a new calculation.

The instant case is a far cry from an erroneous calculation of damages. None of the putative precedents even faintly support what the district judge has ordered in this case. A better reasoned judgment would have followed the Second Circuit's opinion in *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157 (2d Cir. 1979), *cert. denied*, 449 U.S. 854 (1980). In *Skidmore*, the Second Circuit rejected the claim that "the NRAB lacks jurisdiction to *misinterpret* the bargaining agreement." *Id.* at 159. The court noted that it is specious to say that the NRAB lacks jurisdiction to make mistakes. In my view, as in the opinion of the *Skidmore* court, no obvious mistake was made in this case; even if it were, it would not affect the jurisdiction of the NRAB, as the district court held it did.

The discussion of whether Rule 67 of the present collective bargaining agreement was "adopted unchanged" from Article 36 of the old agreement carries no weight. The arbitration panel flatly decided that there was a change and hence that the 1947 interpretation of the 1945 Memorandum of Understanding was not implicitly a part of the present agreement. I can see no way in which that determination by NRAB can be said not to be "drawn from the essence of the contract," despite that critical phrase's obvious ambiguity.

The dispute thus centers on Rule 1, the scope provision. The district court judge and the majority chide the arbitration panel for not discussing this rule, and go on to interpret it themselves, in favor of the railroad. This is exactly what the Supreme Court and distinguished

commentators[1] have repeatedly warned against: attempts by the federal judiciary to interpret labor contracts in near-complete ignorance of the "common law of the particular plant or industry" to which the majority refers.[2] A more acceptable route, given the feelings of the majority and the district court judge that the arbitration panel had not adequately *discussed* the issue, would have been a remand to the panel for the purpose of such discussion.

In this instance, however, I do not believe that a remand would be the best route. The NRAB award should have been affirmed as written. It appears to me that the parties never contemplated that Rule 1 controlled this case until the railroad reached the district court stage. The entire issue was thus not reviewable, because

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[1] *See, e.g.*, Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1488 (1959) ("Judges—and sometimes lawyer-arbitrators—are tempted to take refuge in the literal meaning of language when they fail to understand the industrial problem. . . ."); Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1024 (1955) ("Arbitration is a means of making collective bargaining work and thus preserving private enterprise in a free government. When it works fairly well, it does not need the sanction of the law of contracts or the law of arbitration. It is only when the system breaks down completely that the courts' aid in these respects is invoked. But the courts cannot, by occasional sporadic decision, restore the parties' continuing relationship; and their intervention in such cases may seriously affect the going systems of self-government.").

[2] The dangers of novel interpretations by the federal courts have long been recognized. *See, e.g.*, H. Laski, *Trade Unions in the New Society* 128-29 (1949) ("That there are serious abuses in union practice which stand in serious need of correction I should not for one moment deny. But generally I am disturbed by the view that, unless there has been a plain breach of enacted law, the courts are the proper place in which to correct the abuses. . . . The smaller the area in which judge-made law decides between the lawful and the unlawful, the better for all concerned. Judicial invasion in this realm is more likely to bring the law into disrepute than in any other.").

waived below. I do not know how else to explain the railroad's statement in its brief before NRAB:

> "*Rule 1 contains no language of any sort that deals with the "tearing off" function at issue in this dispute.* Furthermore, this Board has already held . . . that Rule 1 was general in nature and did not describe work to be performed. Quite obviously, then, Rule 1 lends no support at all to the claims found here."

(emphasis added). This is quite a change of tune from the claim of the railroad before this court. The railroad now decries the fact that the arbitration panel did not find Rule 1 dispositive. Apparently, however, the dissenters in the arbitration decision were equally in the dark, for they also failed to mention Rule 1's applicability.[3]

BRAC has a colorable claim as to the inapplicability of Rules 1(b) and 1(c). The argument comes down to a close textual examination of Rule 1 and a discussion of the meaning of "facility" and "location" in the Rule. It is certainly not the sort of argument that could be resolved by the "cursory reading" that the majority mentions. It is also, in my view, not the sort of interpretational argument that federal courts are supposed to settle in cases arising under the Railway Labor Act.

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[3] Rule 1 was mentioned at other places in the submissions before NRAB. But a fair explanation of the dissenters' omitting to highlight the rule is that it was never stressed as the centerpiece of this litigation. In their NRAB brief, B & O cited Rule 1 again after the language noted above, but only to distinguish the award in the 1980 Kasher decision. BRAC cited Rule 1 to show that its employees were within the scope of the 1973 collective bargaining agreement. It is clear from a detailed inspection of the briefs below that the B & O theory of the case was (originally) that Rule 1 had no application, because "the work of 'tearing off' switch lists was never assigned to the abolished clerical positions at Willard to start with."

To affirm the district court judge in this case requires this court to say that the Fishgold panel went *beyond its jurisdiction* in not addressing an issue that arguably is not compelling and was not properly presented to it. I must dissent from such an active judicial role in an area clearly rendered "off limits" to judicial intermeddling.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2547

BALTIMORE AND OHIO RAILROAD COMPANY,
Appellee,

versus

BROTHERHOOD OF RAILWAY, ETC., *et al.*,
Appellants.

[Filed July 15, 1987]

On Petition for Rehearing with Suggestion
for Rehearing In Banc

ORDER

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Wilkinson. Judge Ervin dissents.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-84-3140

BALTIMORE AND OHIO RAILROAD COMPANY

v.

BROTHERHOOD OF RAILWAY, *et al.*

MEMORANDUM

This action is brought by Baltimore & Ohio Railroad Company (B&O) against the Brotherhood of Railway, Airline, and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC), the Railroad Yardmasters of America and a number of employees represented by BRAC to vacate awards issued by a panel of the National Railway Adjustment Board. BRAC has counterclaimed to enforce the awards. Both sides have filed motions for summary judgment. This Court held a hearing on the motions on September 12, 1985, and, after requesting supplemental filings by the parties, held a second hearing on January 24, 1986.

The controversy concerns whether the tearing off and separating of teletype messages and reports by yardmasters, rather than clerks or telegraphers, violates the 1973 collective bargaining agreement between B&O and BRAC. The work in question takes merely seconds to perform and is done by yardmasters at locations where no clerks or telegraphers are present. The dispute is complicated by a number of prior agreements and interpretations, changes in the technology of message transmission and the merger of the clerks' and telegraphers' unions in 1973.

Beginning in December 1975, BRAC instituted a number of claims against B&O for the alleged improper assignment of the tearing and separating job to yardmasters. In 1980 a panel of the NRAB chaired by Richard R. Kasher sustained a claim arising from the Ivorydale Yard Office in Cincinnati. B&O paid that claim but continued to contest similar claims filed at different locations.[1] In April 1982 six such claims were submitted to an NRAB panel chaired by Herbert Fishgold. These claims arose in different places. In April 1983 an additional claim, arising at the Barr Yard in Chicago, was submitted to a second panel chaired by Robert Silagi.

On June 28, 1984 the two panels issued their decisions. The Silagi panel denied the claim by BRAC. The Fishgold panel, in contrast, sustained the claims and awarded the affected employees payment for three hours of work for each day on which yardmasters were tearing off and separating teletypes. The cost of paying the claims for alleged past violations alone approaches three million dollars.

B&O argues that the Fishgold panel exceeded its jurisdiction by disregarding the language and the history of the collective bargaining agreement between the parties. In addition, it contends that, assuming the validity of the claims, the panel nevertheless erred by awarding penalty pay not provided for by the agreement.[2] This

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[1] B&O makes a secondary argument in this action that the situation presented in the Kasher case is distinguishable from the situations presented in the Fishgold case (and the Silagi case) in that there was a clerk working along side the yardmaster at the Ivorydale Yard Office. This distinction would make Rule 1(c) inapplicable at the Ivorydale location. However, Rule 1(b) would have been applicable and therefore under this court's reasoning the Kasher decision was erroneous. See page 6, *infra*.

[2] B&O also argues that the Fishgold panel's decision was procedurally defective because of a two year delay in the issuance of the award and the substitution of the two partisan members of the panel after submission of the case but before the decision. Neither

Court agrees with B&O in both respects and vacates the awards made by the Fishgold panel.

I.

An NRAB award in a "minor dispute" may be set aside on only one of three grounds: (1) failure of the Board to comply with the requirements of the Railway Labor Act; (2) failure of the Board to conform or confine itself to matters within the scope of its jurisdiction; and (3) fraud or corruption. 45 U.S.C. Section 153 First (q). The Supreme Court has stated that the Railway Labor Act "means what it says" when it provides that a final order of the Adjustment Board is conclusive on the parties and shall be set aside only for the three reasons provided by the statute. *Union Pacific R.R. Co. v. Sheehan*, 439 U.S. 89 (1978) (per curiam). Further, it has been said that a district court's review of an award by the NRAB is "among the narrowest known to the law." *Norfolk & Western Rwy. Co. v. BRAC*, 657 F.2d 596, 599 (4th Cir. 1981). Thus, it is clear that this Court may not substitute its view for the Board's on the interpretation of the agreement. *See, e.g., Gunther v. San Diego & Arizona Eastern Rwy. Co.*, 382 U.S. 257 (1965); *BRAC v. Kansas City Terminal Rwy. Co.*, 587 F.2d 903, 908 (8th Cir. 1978).

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argument is persuasive. Although a two year delay is a substantial one, there was no provision in the parties' collective bargaining agreement mandating the issuance of an award within a specified period. *See Jones v. St. Louis-San Francisco Rwy. Co.*, 728 F.2d 257 (6th Cir. 1984). Similarly, the court finds no prejudice in the substitution of the two partisan members of the panel after the case was submitted but before the decision was rendered. This case is clearly distinguishable both from *Jones v. St. Louis-San Francisco Rwy. Co.*, where one member of the panel, who was substituted after oral argument, did not read the transcript of the argument and from *In re Cia de Navigacion*, 359 F.Supp. 898 (S.D.N.Y. 1973), where one of the partisan members had died and the advantages of the party for whom he had acted as representative were lost.

Nevertheless, this Court should not enforce an award which, under the collective bargaining agreement, simply makes no sense. If an award is "without basis in reason or fact," it is deemed to have been made outside of the Board's jurisdiction. *See, e.g., BRAC v. Kansas City Terminal Rwy. Co.*, 587 F.2d at 906; *IAM v. Southern Pacific Transportation Co.*, 626 F.2d 715 (9th Cir. 1980); *Brotherhood of Railroad Trainmen v. Central Georgia Rwy. Co.*, 415 F.2d 403, 412 (5th Cir.), *cert. denied*, 396 U.S. 1008 (1969). As has been said, an arbitrator "does not sit to dispense his own brand of industrial justice." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *Clitchfield Coal Co. v. District 28, United Mine Workers*, 720 F.2d 1365, 1368 (4th Cir. 1983). This court has the responsibility to examine the arbitrator's decision, taking into account the history as well the language of the agreement, *see, e.g., Clitchfield Coal Co. v. District 28, United Mine Workers, supra; Norfolk Shipbuilding & Drydock Corp. v. Local 684*, 671 F.2d 797 (4th Cir. 1982), and to refuse to enforce the award if it contravenes the essence and purpose of the agreement. *See, e.g., Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977); *Wilson v. Chicago & Northwestern Transp. Co.*, 728 F.2d 963 (7th Cir.), *cert. denied*, 104 S.Ct. 2686 (1984).

II.

The immediate factual background for the present dispute is provided by the merger of the clerks' and telegraphers' union in 1973 and the opening of Terminal Service Centers by B&O in 1974. Upon the merger of the unions a new collective bargaining agreement was entered into, and it is the provisions of that agreement which are in question here. The effect of the opening of the Terminal Service Centers was to move yard and agency personnel to one central location, leaving only the yardmasters in the individual yards. Devices to receive com-

munications were placed in the yards, and it is the tearing off and separating of messages from these devices by the yardmasters which is the core of this controversy.

Two of the rules in the 1973 collective bargaining agreement bear directly upon the matters in issue. They provide, as follows:

Rule 1

Assignment of Work.

(b) When the assignment of clerical work in an office station, warehouse, freight house, store house, or yard occurring within a spread of ten (10) hours from the time such clerical work begins, is made to more than one (1) employee not classified as a clerk, the total time devoted to such work by all such employees at a facility specified herein shall not exceed four (4) hours per day.

(c) When a position covered by this agreement is abolished, the work assigned to same which remains to be performed will be reassigned in accordance with the following:

(1) To position or positions covered by this agreement when such position or positions remain in existence at the location where the work of the abolished position is to be performed.

(2) In the event no position under this agreement exists at the location where the work of the abolished position or positions is to be performed, then it may be performed by a Yardmaster, Foreman, or other supervisory employee, provided that less than four (4) hours' work per day of the abolished position or positions remains to be performed; and further provided that such work is incident to the duties of a Yard-

master, Foreman, or other supervisory employee.

(3) Where the remaining work of an abolished position is reassigned to positions coming within this agreement, an effort will be made, where practicable, to reassign the work to a position or positions assigned similar work, higher rated work to higher rated positions and lower rated positions.

(4) Work incident to and directly attached to the primary duties of another class or craft such as preparation of time cards, rendering statements or reports in connection with performance of duty, tickets collected, cars carried in trains, and cars inspected or duties of a similar character, may be performed by employees of such other craft or class.

Rule 67

Printing Telegraph Machines.

Positions in telegraph or other offices requiring the operation of printing telegraph machines or similar devices that are used for transmitting and receiving, either or both, information, or communications of record, irrespective of title by which designated or character of services performed, shall be filled by employees coming within the scope of this Agreement.

Work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and correction of errors, shall be performed by employees covered by this Agreement.

Employees assigned as machine or device operators in relay offices shall not be required to punch or type

longer than two (2) consecutive hours without a period of at least twenty (20) minutes on other work and not more than six (6) hours punching in any eight (8) hour period. Machines or device operators shall be allowed a short relief of ten (10) minutes in each four (4) hour period when requested. The remainder of the day may be assigned to other work under this Agreement.

None of the foregoing applies to the handling of train orders or Forms A or any communication with a train dispatcher.

In reaching its conclusion that members of BRAC have the exclusive right to tear off and separate messages from teletype machines, the Fishgold panel relied upon the second paragraph of Rule 67. That paragraph does provide that "work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports . . . shall be performed by employees covered by this Agreement." However, the Fishgold panel completely ignored the provisions of Rule 1 which expressly limit the reach of Rule 67. In so doing the panel committed two fundamental errors which eviscerate its awards.

First, the panel in effect rewrote the parties' contract by simply omitting one of its critical provisions. Rule 1 could be neither more clear nor more clearly applicable to these facts. The rule expressly contemplates that *de minimus* amounts of work covered by the Agreement can be performed by non-members of BRAC. Rule 1(b) provides that when clerical work is assigned to one or more employees not covered by the Agreement, the total amount of work so assigned may not exceed four hours per day. Similarly, Rule 1(c) provides that when a position under the agreement is abolished at a particular location, a yard master may do the work assigned to that

position, provided that less than four hours' of such work remains to be performed.[3]

Second, by ignoring Rule 1 the panel contravened the essence and purpose of the 1973 agreement. That agreement, entered into upon the merger of the two unions, was not intended to alter the underlying substantive rights of the parties but to incorporate in a single document the rules governing their relationship. Prior to the 1973 agreement there had been in the agreements between the telegraphers' union and B&O a series of predecessor provisions to Rule 67, dating back to a 1947 interpretation of a 1945 memorandum of understanding, which, as the Fishgold panel acknowledged, strongly indicated the intent to permit the type of work involved here to be assigned to non-telegraphers. The Fishgold panel dismissed this history by pointing to the fact that Rule 67 was not adopted entirely unchanged from its predecessors and that therefore under Rule 75 (providing for continuity of interpretation only where a provision was adopted unchanged), prior agreements relating to it were voided. However, by ignoring Rule 1—which prior to 1973 had been in the clerks' collective bargaining agreement but not in the telegraphers' agreement—the panel failed to recognize that a *de minimus* provision in Rule 67 itself was made unnecessary by the provisions of Rules 1(b) and 1(c).[4]

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[3] BRAC has belatedly suggested that "location" as used in Rule 1(c) means a broad geographic area, such as Cincinnati, Baltimore or Chicago. This obviously cannot be; if it were the Rule 1(c) would be a nullity. Furthermore, the Fishgold panel itself used the term more narrowly, referring to "six (6) locations at Willard, Ohio." In any event, even if "location" were interpreted as suggested to BRAC, Rule 1(b) still would authorize the assignment to non-BRAC members of a *de minimus* amount of work covered by the agreement.

[4] BRAC argues that prior to the 1973 merger the telegraphers and the clerks were the only crafts contending for the work of tearing off and separating teletype messages (except at the Barr

III.

For the foregoing reasons this court finds that the Fishgold panel exceeded its jurisdiction in sustaining the claims. Even if it is assumed, however, that the panel was entitled to totally ignore Rule 1 in reaching its decision, its award would nevertheless have to be vacated because it improperly imposed penalty pay.

The Fourth Circuit has held that penalty pay is proper only if the employer has been guilty of willful or wanton misconduct or if the collective bargaining agreement provides for penalty pay. *See, e.g., Norfolk & Western Rwy Co. v. BRAC*, 657 F.2d 596, 602 (4th Cir. 1981); *Baltimore Regional Joint Board v. Webster Clothes, Inc.*, 596 F.2d 95, 98 (4th Cir. 1979); *Westinghouse Elec. Corp. v. IBEW*, 561 F.2d 521, 523 (4th Cir. 1977); *accord, United Electrical, Radio & Machine Workers v. Litton*, 704 F.2d 393, 397 (8th Cir. 1983). Here, B&O's conduct certainly cannot be fairly characterized a "willful" or "wanton." Any contention that B&O was violating clear contractual language is belied by the fact that it took the Fishgold panel two years to render its decision.

Likewise, it is clear that the collective bargaining agreement does not provide for penalty pay. Indeed, BRAC does not argue to the contrary. The only contractual provision relied upon by the Fishgold panel and by BRAC is Rule 8, pertaining to overtime pay after work or on days other than normal work days. There is no authority in the Agreement to apply this rule to the alleged violation of Rule 67; by awarding penalty pay

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Yard in Chicago). Assuming the truth of that assertion, it is immaterial. Prior to the merger no provision in the telegraphers' collective bargaining agreement excepting *de minimus* teletype work from the agreement's coverage conferred (or could have conferred) any rights upon the clerks. Moreover, even if it had, the clerk's collective bargaining agreement contained the *de minimus* language which became Rule 1 in the 1973 agreement.

the Fishgold panel was merely "dispensing its own brand of industrial justice." An award of payment for three hours per day for work which took just seconds to perform simply cannot be characterized as compensatory. *See Westmoreland Coal Co. v. United Mine Workers*, 550 F.Supp. 1044, 1047 (W.D. Va. 1982).

A separate order granting B&O's motion for summary judgment and vacating the Fishgold panel's award is being entered herewith.

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Judge

Date: February 25, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-84-3140

BALTIMORE AND OHIO RAILROAD COMPANY

v.

BROTHERHOOD OF RAILWAY, *et al.*

ORDER

For the reasons stated in the memorandum entered herein, it is this 25th day of February 1986

ORDERED

(1) Plaintiff's motion for summary judgment is granted;

(2) Defendants' motion for summary judgment is denied;

(3) The awards entered by the Fishgold panel of the National Railway Adjustment Board in this matter are hereby vacated and judgment is entered on behalf of plaintiff against defendants.

/s/ J. Frederick Motz
J. FREDERICK MOTZ
United States District Judge

[Filed Feb. 26, 1986]

Award Number 24861
Docket Number CL-24005

APPENDIX D

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert Fishgold, Referee

PARTIES TO DISPUTE:

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood (GL-9382) that:

(1) Carrier violated and continues to violate the Clerk-Telegrapher Agreement when, commencing May 8, 1976, and continuing, it causes and permits employees not covered thereby to perform work around-the-clock seven (7) days per week in connection with the operation of receiving teletype units and similar devices used for receiving communications, including tearing off and separating message reports of cars at the East and West Bound Hump Yard Offices, East and West Bound Hump Yard Shanties and East and West Bound Retarder Towers, which are six (6) locations at Willard, Ohio, and

(2) As a result of such impropriety, Carrier shall compensate eighteen (18) designated employees at Willard, indicated below, each, one (1) eight (8) hour days' pay at overtime-rate for each date beginning Saturday, May 8, 1976, and continuing for each and all subsequent dates until the violations cease:

Westbound Hump Yard Office

7:59 AM- 3:59 PM—
C.J. Heffley
3:59 PM-11:59 PM—
C.I. Runion
11:59 PM- 7:59 AM—
R.E. Neidermeier

Eastbound Hump Yard Office

7:59 AM- 3:59 PM—
G.H. Bursiel
3:59 PM-11:59 PM—
M.A. King
11:59 PM- 7:59 AM—
A.E. Runion, Jr.

Westbound Retarder Tower

7:59 AM- 3:59 PM—
H.J. Haupricht
3:59 PM-11:59 PM—
R.L. Hastings
11:59 PM- 7:59 AM—
Helen Rinker

Eastbound Retarder Tower

7:59 AM- 3:59 PM—
L.D. Dawson
3:59 PM-11:59 PM—
L.J. Oney
11:59 PM- 7:59 AM—
R.J. Neidermeier

Westbound Hump Yard Shanty

7:59 AM- 3:59 PM—
J.M. Underwood
3:59 PM-11:59 PM—
J. Rusynyk
11:59 PM- 7:59 AM—
G.H. Hiltburner

Eastbound Hump Yard Shanty

7:59 AM- 3:59 PM—
F.N. McQuown
3:59 PM-11:59 PM—
P.E. Clemons
11:59 PM- 7:59 AM—
J.C. Beekman

OPINION OF BOARD

This dispute, one of six involving the same issue between the parties, concerns the Carrier's right to permit Yardmasters to "tear off" a list of freight cars, a "switch list," from a receiving machine following transmittal by use of telecommunications printers at Willard, Ohio.

By way of background, on February 15, 1976, Carrier established a Terminal Service Center at Willard, Ohio. Similar data centers have been established at various other terminals throughout the Carrier's system and such data centers are essentially a consolidation of yard and agency functions into a central location where the same machinery and data are available. In most of the terminals where Carrier has established these data centers, yard and agency personnel have been moved into the new Terminal Service Center, leaving only yardmasters in the individual yards.

The Carrier placed communication receiving devices (Kleinschmidts) in the East and West Bound Hump Yard Offices, (Data Fax) in the East and West Bound Hump Yard Shanties, and (Data Fax) in the East and West Bound Retarder Towers at Willard, Ohio. The Organization contends that by so doing, the Carrier is causing and permitting employes not covered by the Clerks-Telegraphers Agreement to operate such communication receiving devices, including the work of removing (tearing off) and separating message reports of cars from such devices.

The dispute involves the parties' Scope Rule and Rule 67, Printing and Telegraph Machines, which, in relevant part, reads as follows:

> "Rule 67—Printing Telegraph Machines
>
> Positions in telegraph or other offices requiring the operating of printing telegraph machines or similar devices that are used for transmitting and receiving or both, information, or communications of record, irrespective of title by which designated or character or services performed, shall be filled by employees coming within the scope of this Agreement.
>
> Work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and correction of errors, shall be performed by employees covered by this Agreement."

Claims that the Yardmaster tearing off the lists and separating the copies violated Rule 67 began to be received on all Carriers' properties. Since the dispute could not be resolved on the property, the Organization processed a December 1975 claim in the Cincinnati yard office and presented it to this Board for adjudication. The Board sustained the claim in Award 22912 (Kasher) which, however, reduced the claim of eight hours pay "for work that took just a few seconds to perform" to a three-hour call.

The Organization argues forcefully that the merger of Clerks' and Telegraphers' crafts in 1973 guaranteed to employes covered by the joint Clerk-Telegrapher agreement the exclusive right to perform all work in all offices involving teletype machines including tearing off and separating messages. The Organization acknowledges that hundreds of demands for eight hours' pay based upon claimed violations of Rule 67 were submitted and held in abeyance pending a decision in Award 22912. The Organization asserts that Carrier bargained in bad faith when it refused to honor Award 22912 and apply it to the pending identical claims. The Organization attacks Carrier's reference to former Telegraphers' Agreements with Carrier as outmoded for over 30 years. The Organization also claims that the disputes as to "communication work" over the years was between Clerks and Telegraphers and not Yardmasters, nor have Yardmasters even contended for such work. Moreover, the Organization points out that although the Railroad Yardmasters of America were named as an interested third party in the proceedings in the claim leading to Award 22912, the Yardmasters elected not to participate in that case. Nor are the Yardmasters making any claim to the disputed work in the instant case. The Organization rejects the notion that any portion of the operation of a teletype machine, no matter how slight, may be splintered from the jurisdiction of the Clerks, citing Awards 1501 (Shaw) and 2282 (Fox).

The Carrier argues with equal vigor that Award 22912 must be overturned. The doctrine of stare decisis, says the Carrier, is not absolute and should not be followed when an award is palpably erroneous. The history of collective bargaining must be given due consideration. Past practice is an important element in disclosing how the parties' themselves interpreted their agreement. In any event Claimant's demand for 8 hours' pay is harsh and excessive.

The Organization relies heavily upon Rule 67, second paragraph, which assigns to Clerks the work of "tearing off and separating messages and reports." Such language in the Organization's view, states in the simplest, most positive, unequivocal language that certain work, including the tearing off and separating of messages and reports, can only be performed by employes covered by the Clerks' Agreement; that the rules leave nothing to interpretation.

Citing both Award 22912 and Rule 75, the Organization also argues Rule 67 did not adopt, unchanged, Article 36. Rule 75, which was apparently intended to provide a continuum of interpretations of the rules extracted from former contracts, reads as follows:

> "This Agreement supersedes previous Collective Bargaining Agreements, and interpretations thereof, between the parties, and existing Circulars, Memoranda of Agreement and Letters of Agreement are cancelled unless otherwise agreed between the parties. Previous interpretations to Rules in this Agreement, where such Rules have been adopted unchanged from previous Agreements, continue to apply unless in conflict with other Rules in this Agreement. Effective National Agreements remain in effect unless, or until, changed in accordance with Railway Labor Act, as amended."

The Organization contends that since Article 36 was not adopted unchanged; and Rule 67 is clear on its face, any conflicting past practices are irrelevant.

The Carrier submits that Rule 67 was not changed; that all of the language found in that rule was also found in Article 36 of the former Telegraphers' Agreement. Referring to the collective bargaining history, the Carrier asserts that Rule 67 had its origin in Article 36, a former Telegraphers' Article dating back to 1945 (Memorandum of Understanding dated February 17,

1945, made between the Carrier and the former Telegraphers' Organization). According to Carrier, former Article 36 was allegedly applicable only to "inter-city" communications. Thus, following the Carrier's argument, since the current dispute centers on the handling of "intra-city" communications, allegedly not covered by Rule 67, it is permissible for a Yardmaster or some other employe not covered by the Clerks-Telegraphers' Agreement to operate such teletype and/or similar devices, including the tearing off and separating of the reports in question. The Carrier concludes that Article 36 never had application to intra-city communications, and since the parties purposely intended to preserve the prior applications of rules found in the former separate agreements through the provisions of Rule 75, Award 22912 must be found to have no precedential value.

Continuity in the interpretation of contract rules is highly desirable, and such interpretations should not be overruled without strong and compelling reasons. While it is true that Award 22912 involved only one instance at the Cincinnati Terminal of the Carrier, there is no meaningful way to distinguish the rationale of the decision in this dispute from that decision since it involves interpretation of the same contract language. The parties are the same, the agreement is the same, and the facts are virtually identical. This Board is certainly aware that there will be difficulty on this property in having contrary awards in different locations on the same issue under the same basic facts. However, the Board is also aware that it has a responsibility to properly assess the intent of the parties as evidenced by the contract langauge. In so doing, we conclude that the opinion reached in Award 22912 is the correct one.

In so holding, we are not disregarding the origin of Rule 67 nor the clear intent of Rule 75. Prior to the June 4, 1973 Clerks-Telegraphers Agreement, there had been a history of contract language and Rules, and mem-

orandum of understanding and letters of agreements which attempted to embody interpretations of the existing language. The overwhelming basis for this history was the continuing claims being made by both Clerks and Telegraphers for work related to the introduction of printing teletype machines on Carrier property. Indeed, with the apparent exception of the Barr Yard Office in Chicago, where such machinery was installed in 1948, and subsequently replaced by computers in 1966 and Kleinschmidt Receive Only Printers and Data Fax machines in 1971 and 1972, and where Yardmasters tore off and separated switch lists, there was no similar, long standing history at other Carrier Terminals prior to the Consolidated Clerk-Telegrapher Agreement, effective June 4, 1973.

While the Board is not persuaded that merely because Article 36 had 18 paragraphs and Rule 67 only had 4, that Article 36 was not adopted unchanged. The Board is persuaded that, when read in conjunction with Rule 75, the failure of the parties to specifically adopt in Rule 67 the distinction between "inter-city" and "intra-city" communications evidenced by the 1945 Memorandum of Understanding, undermines the Carrier's contractual argument. While the Board can accept that certain obsolete provisions pertaining to Morse telegraph and restrictions which conflicted with other rules were deleted in Rule 67 without changing the meaning of Article 36, the Board cannot conclude that the failure to continue to identify a specific distinction between "intra-city" and "inter-city" communications means that Rule 67 was unchanged from Article 36.

Rule 75 states specifically that the new Agreement supersedes interpretations of previous Agreements, and *cancels* existing Memorandum of Agreement *"unless otherwise agreed between parties."* (Emphasis added). It then goes to say that "Previous interpretations to Rules in this Agreement, *where such Rules have been*

adopted unchanged from previous Agreement continue to apply . . ." (Emphasis added). It is apparent to the Board that, based upon the history between the Clerks and the Telegraphers, and the intent of Rule 67 and Rule 75, unless Rule 67 specifically adopted within its provisions the alleged distinction between "intra-city" and "inter-city" communications, which was previously adopted and existed as a 1945 Memorandum of Understanding—a supplement to Article 36—Rule 67 did not adopt that distinction, and thus, contrary to the Carrier's argument, Article 36 was not adopted unchanged as regards the issue in dispute.

Finally, in this regard, the Board does not accept the Carrier's further argument that the history and practice since 1948 of allowing Yardmasters in the Barr Yard to tear off and separate these switch lists without any claims by the Clerks until after 1973, constitutes an unabated, unchallenged practice, which Rule 75 cannot negate. As evidenced by the number of claims filed after the merger in 1973 and after the Carrier, in 1974, began to open Terminal Service Centers, resulting in the use of Kleinschmidt Receive Only Printers in the yardmasters' offices, for their receipt of switch lists, this Board cannot conclude that, based upon the experience at one terminal which existed prior to the 1973 Agreement, that the parties intended to contractually sanction this work assignment, even though minimal, to yardmasters. Indeed, this conclusion becomes all the more compelling when the language in Rule 67 is considered in the total context of the prior history: "Work in connection with the operation of . . . receiving units, including tearing off and separating messages, and reports . . . *shall* be performed by employees covered by this Agreement." (Emphasis added). Such express and unambiguous language, with no stated exception comporting with the Carrier's argument, constitutes a clear intent to this Board that any alleged distinction between "intra-city" and "inter-city"

communications which would otherwise allow Yardmasters' to "tear-off" and "separate" switch list cannot be read into Rule 67.

Nor can the Board agree that the case involves an interested third party, the Railroad Yardmasters of America, because the Carrier alleged that the Clerks' Organization was attempting to remove work from the Yardmaster Craft and assign it to clerical employes. The Yardmaster's Organization was given proper notice and elected not to participate in the case. Thus, this issue had not been joined.

Having found that the claims are to be sustained, the question arises as to what is the appropriate remedy. As in Award 22912, the Organization seeks eight (8) hours pay for work that took just a few seconds to perform, albeit on repeated occasions. This Board agrees with Referee Kasher in Award 22912 that such a remedy is inappropriate. This Board further concludes that, as in Award 22912: "A more appropriate remedy is found in the parties' Call Rule—Rule 8. Under this rule Claimant(s) should be compensated three hours since the work performed was two hours or less." While the Board realizes that some may regard such payment as excessive, the Board must remind the parties;

> ". . . the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. In such cases the result is based upon the clear language of the contract, not upon the equities involved," (Footnotes omitted). Elkouri and Elkouri, *How Arbitration Works*, 3rd ed. BNS, 1973, p. 304.

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: /s/ Nancy J. Dever
NANCY J. DEVER
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1984

Award Number 24862

Docket Number CL-24007

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert Fishgold, Referee

PARTIES TO DISPUTE:

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees
The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood (GL-9386) that:

(1) Carrier violated, and continues to violate, the Clerk-Telegrapher Agreement when, beginning March 14, 1976, and continuing, it causes and permits employees not covered thereby to perform work around-the-clock seven (7) days per week in connection with the operation of receiving teletype units and similar devices used for receiving communications, including tearing off and separating message reports of cars, at Evitts Creek Yard Office, the Eastbound Hump Yard Office and the Westbound Hump Yard Car Retarder Office, which are three (3) locations at Cumberland, Maryland, and

(2) Carrier shall, as a result, compensate each employee named, as indicated, eight (8) hours' pay at the pro-rata rate for each date listed, and continuing, as follows:

Evitts Creek Yard Office

7:00 AM to 3:00 PM—B.M. Hill

—March 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, 31; April 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30; May 3, 4, 5,

6, 7, 1976 and each subsequent date Monday through Friday of each week until the violations cease.

3:00 P.M. to 11:00PM—S.J. Swisher

—March 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31; April 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30; May 1, 4, 5, 6, 7, 1976 and each subsequent date Tuesday through Saturday of each week until the violations cease.

11:00 PM to 7:00 AM—R.L. Shepherd

—March 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30; April 2, 3, 4, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30; May 1, 2, 3, 4, 7, 8, 9, 10, 1976 and each subsequent date Friday through Tuesday of each week until the violation cease.

7:00 AM to 3:00 PM—J.M. Emerick

—March 20, 21, 27, 28; April 3, 4, 10, 11, 17, 18, 24, 25; May 1, 2, 8, 9, 1976 and each subsequent Saturday and Sunday of each week until the violations cease.

3:00 PM to 11:00 PM—K.G. Rotruck

—March 21, 28; April 4, 11, 18, 25; May 2, 9, 1976 and each subsequent Sunday of each week until the violations cease.

3:00 PM to 11:00 PM—C.S. Van Meter

—March 15, 22, 29; April 5, 12, 19, 26; May 3, 10, 1976 and each subsequent Monday of each week until the violations cease.

11:00 PM to 7:00 AM—D.W. Hanekamp

—March 17, 18, 24, 25, 31; April 1, 7, 8, 14, 15, 21, 22, 28, 29; May 5, 6, 1976 and each subsequent Wednesday and Thursday of each week until the violations cease.

East Bound Hump Yard Office

7:00 AM to 3:00 PM—T.L. Householder

—March 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31; April 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 24, 25, 26, 27, 28; May 1, 2, 3, 4, 5, 8, 9, 10, 1976 and each subsequent date Saturday through Wednesday of each week until the violations cease.

3:00 PM to 11:00 PM—R.A. Shrout

—March 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, 30, 31; April 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29; May 2, 3, 4, 5, 6, 9, 10, 1976 and each subsequent date Sunday through Thursday of each week until the violations cease.

11:00 PM to 7:00 AM—J.K. Hunt

—March 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31; April 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30; May 1, 4, 5, 6, 7, 8, 1976 and each subsequent date Tuesday through Saturday of each week until the violations cease.

7:00 AM to 3:00 PM—G.H. Mechem

—March 18, 19, 25, 26; April 1, 2, 8, 9, 15, 16, 22, 23, 29, 30; May 6, 7, 1976 and each subsequent Thursday and Friday of each week until the violations cease.

3:00 PM to 11:00 PM—R.R. Wagner

—March 19, 20, 26, 27; April 2, 3, 9, 10, 16, 17, 23, 24, 30; May 1, 7, 8, 1976 and each subsequent Friday and Saturday of each week until the violations cease.

11:00 PM to 7:00 AM—M.E. Roberts

—March 14, 15, 21, 22, 28, 29; April 4, 5, 11, 12, 18, 19, 25, 26; May 2, 3, 9, 10, 1976 and each subsequent Sunday and Monday of each week until the violations cease.

7:00 AM to 3:00 PM—G.C. Fisher

—March 15, 16, 17, 21, 22, 23, 24, 27, 28, 29, 30, 31; April 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 1976 and each subsequent dates Saturday through Wednesday of each week until the violations cease.

3:00 PM to 11:00 PM—P.G. Liller

—March 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 31; April 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, 30; May 1, 2, 5, 6, 7, 8, 9, 12, 1976 and each subsequent dates Wednesday through Sunday of each week until the violations cease.

11:00 PM to 7:00 AM—E.E. Gaus

—March 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, 31; April 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30; May 3, 4, 5, 6, 7, 10, 11, 12, 1976 and each subsequent Monday through Friday of each week until the violations cease.

7:00 AM to 3:00 PM—J.W. Hemmis

—March 18, 19, 25, 26; April 1, 2, 8, 9, 15, 16, 22, 23, 29, 30; May 6, 7, 1976 and each subsequent Thursday and Friday of each week until the violations cease.

3:00 PM to 11:00 PM—K.G. Rotruck

—March 15, 16, 22, 23, 29, 30; April 5, 6, 12, 13, 19, 20, 26, 27; May 3, 4, 10, 11, 1976 and each subsequent Monday and Tuesday of each week until the violations cease.

11:00 PM to 7:00 AM—C.M. Beckman

—March 20, 21, 27, 28; April 3, 4, 10, 11, 17, 18, 24, 25; May 1, 2, 8, 9, 1976 and each subsequent Saturday and Sunday of each week until the violations cease.

OPINION OF BOARD: This dispute, one of six involving the same issue between the parties, concerns the Carrier's right to permit Yardmasters and/or Trainmen to "tear off" a list of freight cars, a "switch list," from a receiving machine following transmittal by use of telecommunications printers at Cumberland, Maryland.

By way of background, on May 5, 1976, Carrier established a Terminal Service Center at Cumberland, Maryland. Similar data centers have been established at various other terminals throughout the Carrier's system, and such data centers are essentially a consolidation of yard and agency functions into a central location where the same machinery and data are available. In most of the terminals where Carrier has established these new data centers, yard and agency personnel have been moved into the new Terminal Service Center, leaving only yardmasters in the individual yards.

The Carrier placed Kleinschmidt and Data Fax Communications receiving machine in Evitts Creek Yard Office and the Eastbound Hump Yard Office at Cumberland, Maryland and assigned operation to Yardmasters. The Carrier installed Data Fax equipment in the Westbound Hump Yard Retarder Office, and assigned operation to Trainmen.

The organization contends that by so doing, the Carrier is causing and permitting employees not covered by the Clerks-Telegraphers Agreement to operate such communication receiving devices, including the work of removing (tearing off) and separating message reports of cars from such devices.

The dispute involves the parties' Scope Rule and Rule 67, Printing and Telegraph Machines. Claims that the Yardmaster's tearing off the list and separating the copies violated Rule 67 began to be received on all Carrier's properties. Since the dispute could not be resolved on the property, the Organization processed a December 1975 claim in the Cincinnati yard office and presented it to this Board for adjudication. The Board sustained the claim in Award 22912 (Kasher) which, however, reduced the claim of eight hours pay "for work that took just a few seconds to perform" to a three-hour call.

Thereafter, this Board, with this Referee sitting, in Award 24861—the first of the six pending disputes involving the same issue—after reviewing Award 22912 and the contracts, arguments and facts in Award 24861, concluded that the opinion reached in Award 22912 was correct. In so doing, this Board determined that, contrary to the Carrier's argument, Article 36 was not adopted unchanged in Rule 67 as regards the issue in dispute, and that read in the context of Rule 75, "the express and ambiguous language of Rule 67, with no stated exception comporting with the Carrier's argument," does not allow Yardmasters to "tear-off" and/or "separate" switch lists.

Having found the claims to be sustained, this Board next addressed the question of appropriate remedy. In agreeing with Referee Kasher's remedy of three-hour call pay in Award 22912, this Board noted that while "some may regard such payment as excessive,"

> ". . . the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. In such cases, the result is based upon the clear language of the contract, not upon the equities involved."

Continuity in the interpretation of contract rules is highly desirable, and such interpretations should not be

overruled without strong and compelling reasons. There is nothing presented in the consideration of the instant decision which in any meaningful way can serve to distinguish the rationale of the decision in this dispute from that in Award 22912 since it involves interpretation of contract language. The parties are the same, the agreement is the same, and the facts are virtually identical. Having assessed the intent of the parties as evidenced by the contract language, we conclude that the opinion reached in Award 22912, as confirmed in Award 24861, is the correct one.

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: /s/ NANCY J. DEVER
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1984

Award Number 24863
Docket Number CL-24012

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert Fishgold, Referee

PARTIES TO DISPUTE:

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees
The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood (GL-9387) that:

(1) Carrier violated, and continues to violate, the Clerk-Telegrapher Agreement when, on July 9, 1977, and continuing, it requires and permits Yardmasters, employees not covered thereby, to perform clerical work around-the-clock seven (7) days per week, including the *tearing off* of reports of cars from teletype receiving units installed and in operation at Seawall and Stonehouse Cove Yards, Curtis Bay, Baltimore, Maryland, and

(2) Carrier shall, as a result, compensate the listed clerical employees at Baltimore, Maryland, each, eight (8) hours' pay for the shifts shown, seven days per week, commencing July 9, 1977, and continuing for so long as the violation exists:

Seawall Yard	Stonehouse Cove Yard
7:00 AM- 3:00 PM— C.E. Sturdivant	7:00 AM- 3:00 PM— A.A. Womack
3:00 PM-11:00 PM— R.C. Conrad	3:00 PM-11:00 PM— R.T. Carletti
11:00 PM- 7:00 AM— R.H. Lee	11:00 PM- 7:00 AM— J.L. Darden

OPINION OF THE BOARD:

This dispute, one of six involving the same issue between the parties, concerns the Carrier's right to permit Yardmasters to "tear off" a list of freight cars, a "switch list," from a receiving machine following transmittal by use of telecommunications printers at Baltimore, Maryland.

By way of background, on July 1, 1977, Carrier established a Terminal Service Center at Baltimore, Maryland. Claimants had been assigned to positions in Curtis Bay Yard at locations known locally as Seawall and Stonehouse Cove prior to the movement of their work to the new Data Center on July 1, 1977. Effective close of business July 8, 1977, all clerical position at Seawall and Stonehouse Yards, Curtis Bay, Baltimore, Maryland were abolished. A Kleinschmidt communication receiving machine was put in both yards, and assigned operation to Yardmasters.

The organization contends that by so doing, the Carrier is causing and permitting employees not covered by the Clerks-Telegraphers Agreement to operate such communication receiving devices, including the work of removing (tearing off) and separating message reports of cars from such devices.

The dispute involves the parties' Scope Rule and Rule 67, Printing and Telegraph Machines. Claims that the Yardmaster's tearing off the list and separating the copies violated Rule 67 began to be received on all Carrier's properties. Since the dispute could not be resolved on the property, the Organization processed a December 1975 claim in the Cincinnati yard office and presented it to this Board for adjudication. The Board sustained the claim in Award 22912 (Kasher) which, however, reduced the claim of eight hours pay "for work that took just over a few seconds to perform" to a three-hour call.

Thereafter, this Board, with this Referee sitting, in Award 24861—the first of the six pending disputes involving the same issue—after reviewing Award 22912 and the contracts, arguments and facts in Award 24861, concluded that the opinion reached in Award 22912 was correct. In so doing, this Board determined that, contrary to the Carrier's argument, Article 36 was not adopted unchanged in Rule 67 as regards the issue in dispute, and that read in the context of Rule 75, "the express and ambiguous language of Rule 67, with no stated exception comporting with the Carrier's argument," does not allow Yardmasters to "tear-off" and/or "separate" switch lists.

Having found the claims to be sustained, this Board next addressed the question of appropriate remedy. In agreeing with Referee Kasher's remedy of three-hour call pay in Award 22912, this Board noted that while "some may regard such payment as excessive,"

> ". . . the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. In such cases, the result is based upon the clear language of the contract, not upon the equities involved."

Continuity in the interpretation of contract rules is highly desirable, and such interpretations should not be overruled without strong and compelling reasons. There is nothing presented in the consideration of the instant decision which in any meaningful way can serve to distinguish the rationale of the decision in this dispute from that in Award 22912 since it involves interpretation of contract language. The parties are the same, the agreement is the same, and the facts are virtually identical. Having assessed the intent of the parties as evidenced by the contract language, we conclude that the opinion reached in Award 22912, as confirmed in Award 24861, is the correct one.

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has juris-jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: /s/ Nancy J. Dever
NANCY J. DEVER
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1984.

Award Number 24864
Docket Number CL-24017

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert Fishgold, Referee

PARTIES TO DISPUTE:

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood (GL-9390) that:

(1) Carrier violated, and continues to violate, the Clerk-Telegrapher Agreement when, on July 2, 1977, and continuing, it requires and permits Yardmasters, employees not covered thereby, to perform clerical work around-the-clock seven (7) days per week, including the tearing off of message reports of cars from a teletype receiving unit installed and in operation at Locus Point Yard, Baltimore, Maryland, and

(2) Carrier shall, as a result, compensate the listed clerical employees at Baltimore, Maryland, each, eight (8) hours' pay for the shifts shown, seven days per week, commencing July 2, 1977, and continuing for so long as the violation exists:

7:59 AM— 3:59 PM—W. E. Tabeling

3:59 PM—11:59 PM—Paul E. Wright

11:59 PM— 7:59 AM—H. W. Harvey

OPINION OF THE BOARD:

This dispute, one of six involving the same issue between the parties, concerns the Carrier's right to per-

mit Yardmasters to "tear off" a list of freight cars, a "switch list," from a receiving machine following transmittal by use of telecommunications printers at Baltimore, Maryland.

By way of background, on July 1, 1977, Carrier established a Terminal Service Center at Baltimore, Maryland. The Terminal Service Center concept contemplates the retention of a perpetual inventory of cars moved into and out of the terminal, and eliminates the necessity of most daily track checking. Effective with the close of business on July 1, 1977, all clerical positions at Locust Point yard, Baltimore, Maryland were abolished. As a result, Yardmasters were the only employees remaining on duty at the Locus Point Yard Office.

The Company installed a Kleinschmidt RO Printer in the yard office at Locust Point. Three-ply paper is used and as lists of cars are transmitted to the yard office, the Yardmasters are able to tear off the sheets they need along the perforation. It is this "tearing off" of the sheets from the RO Printer and the "separating" of the three copies of switch list that gives rise to this dispute.

The organization contends that by so doing, the Carrier is causing and permitting employees not covered by the Clerks-Telegraphers Agreement to operate such communication receiving devices, including the work of removing (tearing off) and separating message reports of cars from such devices.

The dispute involves the parties' Scope Rule and Rule 67, Printing and Telegraph Machines. Claims that the Yardmaster's tearing off the list and separating the copies violated Rule 67 began to be received on all Carrier's properties. Since the dispute could not be resolved on the property, the Organization processed a December 1975 claim in the Cincinnati yard office and presented it to this Board for adjudication. The Board sustained the claim in Award 22912 (Kasher) which, however, reduced

the claim of eight hours pay "for work that took just a few seconds to perform" to a three-hour call.

Thereafter, this Board, with this Referee sitting, in Award 24861—the first of the six pending disputes involving the same issue—after reviewing Award 22912 and the contracts, arguments and facts in Award 24861, concluded that the opinion reached in Award 22912 was correct. In so doing, this Board determined that, contrary to the Carrier's argument, Article 36 was not adopted unchanged in Rule 67 as regards the issue in dispute, and that read in the context of Rule 75, "the express and ambiguous language of Rule 67, with no stated exception comporting with the Carrier's argument," does not allow Yardmasters to "tear-off" and/or "separate" switch lists.

Having found the claims to be sustained, this Board next addressed the question of appropriate remedy. In agreeing with Referee Kasher's remedy of three-hour call pay in Award 22912, this Board noted that while "some may regard such payment as excessive,"

> ". . . the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. In such cases, the results is based upon the clear language of the contract, not upon the equities involved."

Continuity in the interpretation of contract rules is highly desirable, and such interpretations should not be overruled without strong and compelling reasons. There is nothing presented in the consideration of the instant decision which in any meaningful way can serve to distinguish the rationale of the decision in this dispute from that in Award 22912 since it involves interpretation of contract language. The parties are the same, the agreement is the same, and the facts are virtually identical. Having assessed the intent of the parties as evidenced

by the contract language, we conclude that the opinion reached in Award 22912, as confirmed in Award 24861, is the correct one.

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: /s/ Nancy J. Dever
NANCY J. DEVER
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1984

Award Number 24865
Docket Number CL-24018

NATIONAL RAILROAD ADJUSTMENT BOARD
TIHRD DIVISION

Herbert Fishgold, Referee

PARTIES TO DISPUTE:

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood (GL-9388) that:

(1) Carrier violated, and continues to violate, the Clerk-Telegrapher Agreement when, on July 2, 1977 and continuing, it requires and permits Yardmasters, employees not covered thereby, to perform clerical work around the clock seven (7) days per week, including the tearing off of message reports of cars from a teletype receiving unit installed and in operation at Mount Clare Yard, Baltimore, Maryland, and

(2) Carrier shall, as a result, compensate the following listed clerical employees at Baltimore, Maryland, each, eight (8) hours' pay for the shifts shown, seven (7) days per week, commencing July 2, 1977, and continuing for so long as the violation exists:

7:00 AM— 3:00 PM—L. C. Brannon

3:00 PM—11:00 PM—A.G. Bruchsch

11:00 PM— 7:00 AM—C. W. Barr

OPINION OF THE BOARD:

This dispute, one of six involving the same issue between the parties, concerns the Carrier's right to permit Yardmasters to "tear off" a list of freight cars, a "switch list," from a receiving machine following transmittal by use of telecommunications printers at Baltimore, Maryland.

By way of background, on July 1, 1977, Carrier established a Terminal Service Center at Baltimore, Maryland. The Terminal Service Center concept contemplates the retention of a perpetual inventory of cars moved into and out of the terminal, and eliminates the necessity of most daily track checking. Claimants had been assigned to positions in Mount Clare Yard, Baltimore, Maryland prior to the movement of their work to the new data center on July 1, 1977. Effective that date, Carrier abolished all clerical positions at Mount Clare Yard. As a result, Yardmasters were the only employees remaining on duty at the Mount Clare Yard.

The Company installed a Kleinschmidt RO Printer in the Yard Office at Mount Clare. Three-ply paper is used and as lists of cars are transmitted to the yard office, the Yardmasters are able to tear off the sheets they need along the perforation. It is this "tearing off" of the sheets from the RO Printer and the "separating" of the three copies of switch list that gives rise to this dispute.

The organization contends that by so doing, the Carrier is causing and permiting employees not covered by the Clerks-Telegraphers Agreement to operate such communication receiving devices, including the work of removing (tearing off) and separating message reports of cars from such devices.

The dispute involves the parties' Scope Rule and Rule 67, Printing and Telegraph Machines. Claims that the Yardmaster's tearing off the list and separating the copies

violated Rule 67 began to be received on all Carrier's properties. Since the dispute could not be resolved on the property, the Organization processed a December 1975 claim in the Cincinnati yard office and presented it to this Board for adjudication. The Board sustained the claim in Award 22912 (Kasher) which, however, reduced the claim of eight hours pay "for work that took just a few seconds to perform" to a three-hour call.

Thereafter, this Board, with this Referee sitting, in Award 24861—the first of the six pending disputes involving the same issue—after reviewing Award 22912 and the contracts, arguments and facts in Award 24861, concluded that the opinion reached in Award 22912 was correct. In so doing, this Board determined that, contrary to the Carrier's argument, Article 36 was not adopted unchanged in Rule 67 as regards the issue in dispute, and that read in the context of Rule 75, "the express and ambiguous language of Rule 67, with no stated exception comporting with the Carrier's argument," does not allow Yardmasters to "tear-off" and/or "separate" switch lists.

Having found the claims to be sustained, this Board next addressed the question of appropriate remedy. In agreeing with Referee Kasher's remedy of three-hour call pay in Award 22912, this Board noted that while "some may regard such payment as excessive,"

> ". . . the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. In such cases, the result is based upon the clear language of the contract, not upon the equities involved."

Continuity in the interpretation of contract rules is highly desirable, and such interpretations should not be overruled without strong and compelling reasons. There is nothing presented in the consideration of the instant decision which in any meaningful way can serve to dis-

tinguish the rationale of the decision in this dispute from that in Award 22912 since it involves interpretation of contract language. The parties are the same, the agreement is the same, and the facts are virtually identical. Having assessed the intent of the parties as evidenced by the contract language, we conclude that the opinion reached in Award 22912, as confirmed in Award 24861, is the correct one.

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: /s/ Nancy J. Dever
NANCY J. DEVER
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1984

Award Number 24866
Docket Number CL-24019

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Herbert Fishgold, Referee

PARTIES TO DISPUTE:

Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

The Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood (GL-9389) that:

(1) Carrier violated and continues to violate the Clerk-Telegrapher Agreement when, commencing August 14, 1976, and continuing, it causes and permits Yardmasters, employees not covered thereby, to perform work around-the-clock seven (7) days per week in connection with the operation of a receiving teletype unit, including tearing off and separating message reports of cars at Newark Yard Office, Newark, Ohio, and

(2) As a result of such impropriety, Carrier shall compensate the below-listed clerical employees at Newark, Ohio, eight (8) hours' pay for each eight hour shift shown (twenty-shifts) covering seven days per week beginning Saturday, August 14, 1976, and continuing for all subsequent dates and shifts until the violations cease:

Saturday	Sunday
7:00 AM- 3:00 PM— R.D. Fogle	7:00 AM- 3:00 PM— R.D. Fogle
3:00 PM-11:00 PM— V.N. Teagarden	3:00 PM-11:00 PM— V.N. Teagarden
11:00 PM- 7:00 AM— D.M. Laughlin	

Monday

7:00 AM- 3:00 PM—
T.D. Riley

3:00 PM-11:00 PM—
N.R. Chester

11:00 PM- 7:00 AM—
E.J. Staley

Tuesday

7:00 AM- 3:00 PM—
T.D. Riley

3:00 PM-11:00 PM—
N.R. Chester

11:00 PM- 7:00 AM—
M.H. Redman

Wednesday

7:00 AM- 3:00 PM—
W. Dorsey

3:00 PM-11:00 PM—
G. Henry

11:00 PM- 7:00 AM—
M.H. Redman

Thursday

7:00 AM- 3:00 PM—
W. Dorsey

3:00 PM-11:00 PM—
D.I. Henderson

11:00 PM- 7:00 AM—
G.M. Henry

Friday

7:00 AM- 3:00 PM—
H. Fry

3:00 PM-11:00 PM—
D. Hendershot

11:00 PM- 7:00 AM—
D.C. Wentz

OPINION OF BOARD:

This dispute, one of six involving the same issue between the parties, concerns the Carrier's right to permit Yardmasters to "tear off" a list of freight cars, a "switch list," from a receiving machine following transmittal by use of telecommunications printers at Newark, Ohio.

By way of background, on April 26, 1976, Carrier established a Terminal Service Center at Newark, Ohio. The Terminal Service Center concept contemplates the retention of a perpetual inventory of cars moved into and out of the terminal, and eliminates the necessity of most daily track checking. Prior to the opening of the Newark Terminal Service Center, yard clerks were stationed at Newark Yard. When the Terminal Service Center at Newark was opened, the yard clerical employees were moved into the center and only Yardmasters remained in the yard office.

Effective August 14, 1976, Yardmasters at the Newark Ohio Yard Office operated a Kleinschmidt RO Printer which was installed at the office. Single-ply paper is used, and as lists of cars are transmitted to the yard office, the Yardmasters are able to tear off the sheets they need along the perforation. It is this "tearing off" of the sheets from the RO Printer that gives rise to this dispute.

The Organization contends that by so doing, the Carrier is causing and permitting employees not covered by the Clerks-Telegraphers Agreement to operate such communication receiving devices, including the work of removing (tearing off) and separating message reports of cars from such devices.

The dispute involves the parties' Scope Rule and Rule 67, Printing and Telegraph Machines. Claims that the Yardmaster's tearing off the list and separating the copies violated Rule 67 began to be received on all Carrier's properties. Since the dispute could not be resolved on the property, the Organization processed a December 1975 claim in the Cincinnati yard office and presented to this Board for adjudication. The Board sustained the claim in Award 22912 (Kasher) which, however, reduced the claim of eight hours pay "for work that took just a few seconds to perform" to a three-hour call.

Thereafter, this Board, with this Referee sitting, in Award 24861—the first of the six pending disputes involving the same issue—after reviewing Award 22912 and the contracts, arguments and facts in Award 24861, concluded that the opinion reached in Award 22912 was correct. In so doing, this Board determined that, contrary to the Carrier's argument, Article 36 was not adopted unchanged in Rule 67 as regards the issue in dispute, and that read in the context of Rule 75, "the express and ambiguous language of Rule 67, with no stated exception comporting with the Carrier's argument," does not allow Yardmasters to "tear-off" and/or "separate" switch lists.

Having found the claims to be sustained, this Board next addressed the question of appropriate remedy. In agreeing with Referee Kasher's remedy of three-hour call pay in Award 22912, this Board noted that while "some may regard such payment as excessive",

> ". . . the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties. In such cases, the result is based upon the clear language of the contract, not upon the equities involved."

Continuity in the interpretaiton of contract rules is highly desirable, and such interpretations should not be overruled without strong and compelling reasons. There is nothing presented in the consideration of the instant decision which in any meaningful way can serve to distinguish the rationale of the decision in this dispute from that in Award 22912 since it involves interpretation of contract language. The parties are the same, the agreement is the same, and the facts are virtually identical. Having assessed the intent of the parties as evidenced by the contract language, we conclude that the opinion reached in Award 22912, as confirmed in Award 24861, is the correct one.

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: /s/ Nancy J. Dever
NANCY J. DEVER
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1984

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-260

TRANSPORTATION COMMUNICATIONS UNION,
Applicant

v.

BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 12, 1987.

/s/ William H. Rehnquist
Chief Justice of the United States

Dated this 30th day of September, 1987

(2)

No. 87-776

In The
Supreme Court of the United States
October Term, 1987

—o—

TRANSPORTATION COMMUNICATIONS UNION,
Petitioner,

v.

THE BALTIMORE AND
OHIO RAILROAD COMPANY,
Respondent.

—o—

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

—o—

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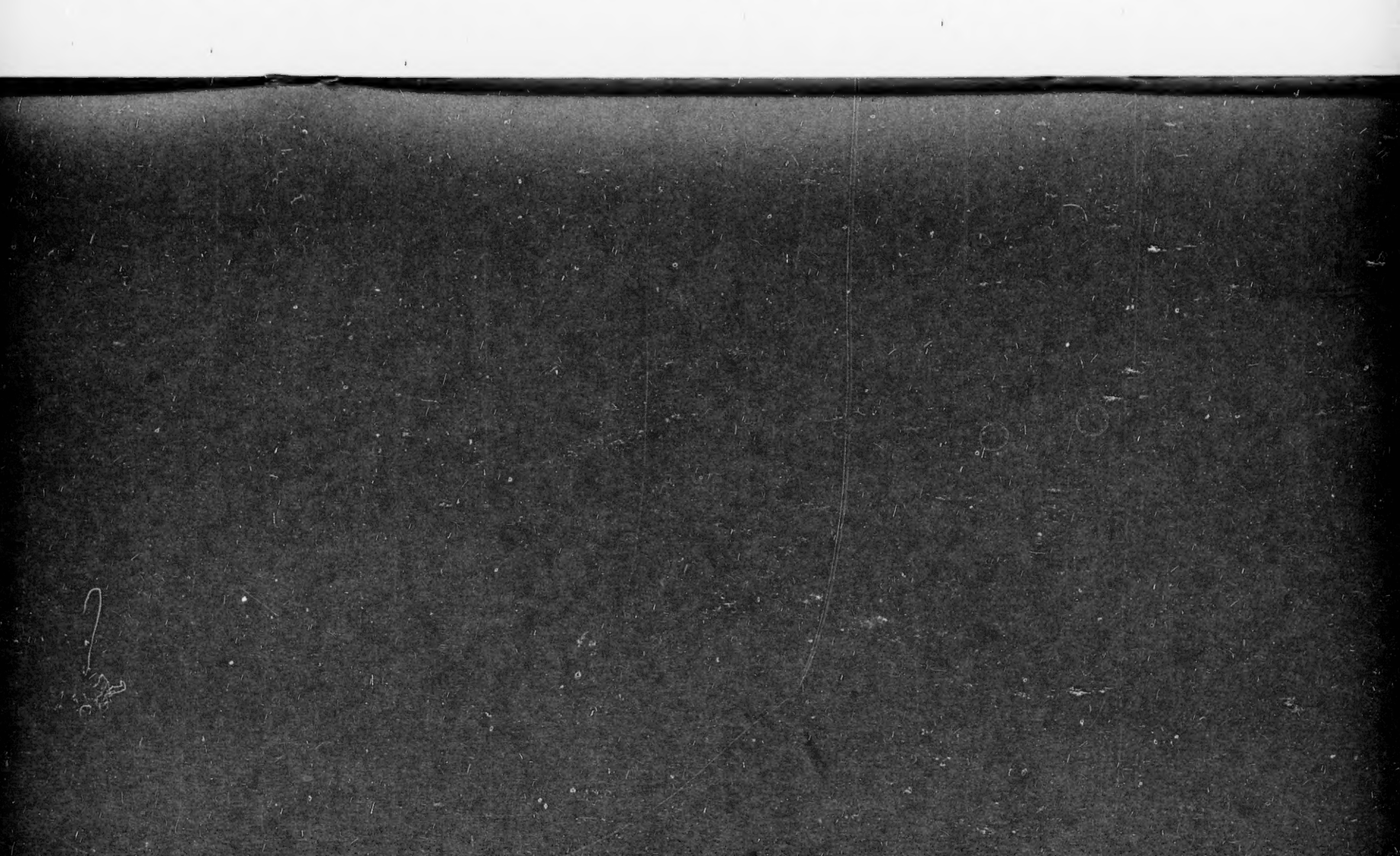

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT, BY COMPLETELY IGNORING CRITICAL CONTRACT TERMINOLOGY, WHICH REQUIRED THAT AN AWARD BE MADE IN FAVOR OF THE RESPONDENT, THE NATIONAL RAILROAD ADJUSTMENT BOARD RENDERED A DECISION WHICH DID NOT DRAW ITS ESSENCE FROM THE PARTIES' COLLECTIVE BARGAINING AGREEMENT, AND THEREBY EXCEEDED ITS JURISDICTION.

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OHIO RAILROAD COMPANY,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RELEVANT STATUTORY PROVISIONS

Railway Labor Act § 3, 45 U.S.C. § 153 First(q), provides:

> (q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in

a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States District Court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order to the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

SUMMARY OF ARGUMENT

Although this Court has stated that the standard of judicial review established by the Railway Labor Act is a narrow one, it has never held that decisions of the NRAB are beyond all judicial review, or that the federal courts must uphold every award, no matter how egregious. An NRAB award may be set aside for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, if an award is wholly baseless

and completely without reason, if it is actually and indisputedly without foundation in reason or fact, or if it fails to draw its essence from the collective bargaining agreement.

This Court has already construed the "jurisdictional" provision of 45 U.S.C. § 153 on several occasions. The lower federal courts need no further guidance concerning its meaning. The decision in this case did nothing more or less than apply well recognized principles. The Fourth Circuit explicitly recognized and applied the prior decisions of this Court which limit the role of federal courts in reviewing NRAB awards. Confining itself within those narrow limits, the Court of Appeals properly held that, even though a labor contract is a generalized code to govern the myriad cases which the draftsman cannot anticipate, this generalized focus does not permit an arbitrator to rewrite the provisions of the collective bargaining agreement. The decision in this case was in full conformity with all of the prior holdings of this Court.

The decision in *Clinchfield Coal,* upon which both the trial court and the Fourth Circuit relied, held that where "the arbitrator fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw its essence from the contract." This holding is fully consistent with the long series of federal cases which have held that an arbitrator may not re-write a labor contract, and that if an arbitrator does not follow the express terms of the agreement, his ruling cannot stand. No conflict exists among the circuits which must be resolved by this

Court. Full review of the Union's petition should thus be denied.

———o———

STATEMENT OF THE CASE

On June 28, 1984, a panel of the National Railroad Adjustment Board (NRAB), chaired by Referee Herbert Fishgold, issued decisions in six cases, finding that The Baltimore & Ohio Railroad Company (Railroad) had violated its collective bargaining agreement with the Brotherhood of Railway, Airline and Steamship Clerks, now the Transportation Communications Union (TCU), because yardmasters rather than clerks tore off and separated five-part switch lists[1] received at railroad yards on teletype printers. Though the task takes just "seconds to perform", and is incident to the yardmasters' other duties, Referee Fishgold ordered that the Railroad pay some sixty individual claimants for three hours' work, for each day on which yardmasters tore off switch lists, a sum approaching $3,000,000 for *past* conduct alone.

The same day, June 28, 1984, another NRAB panel, chaired by Referee Robert Silagi, issued a decision in an

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1. Switch lists are simply compiled lists of railroad cars, with directions concerning their combination for future use. These lists are prepared by clerks, but are used by yardmasters. Incident to their other duties, the yardmasters have been required to tear off the switch lists which they receive for use in their employment, and, because these new printers use multipart paper, since 1971 they have also been required to separate each of the four or five parts of the printer paper from one another. The time consumed in tearing off and separating each such switch list is a matter of seconds. The total time involved in this activity is less than 5 minutes per day.

identical case, brought by TCU on behalf of two individual claimants, finding that the Railroad had *not* violated its collective bargaining agreement with TCU by assigning to yardmasters the task of tearing off switch lists teletyped to Railroad yard office printers.

Beginning in 1974, the Railroad opened Terminal Service Centers at various locations in its system. When these Centers were opened, various yard and agency personnel, including a number of clerical personnel, were moved from railroad yards into centralized data processing offices. This centralization resulted in the creation of a number of new clerical positions in the Centers, and left only yardmasters at the Railroad's yards. As part of this centralization, printers were placed in an additional number of yardmasters' offices. The purpose was to permit yardmasters to receive switch lists electronically from clerical employees who entered switch list data at a Center in the same city. All such transmissions to yardmasters' offices were originated and received in the same city. In virtually every case, clerical positions which existed in yardmasters' offices were abolished, and new clerical positions were created in Centers for the affected clerical employees.[2]

In December 1975, long after yardmasters began to tear off and separate switch lists, TCU began to submit claims to the Railroad contending that the Railroad had violated Rules 1 and 67 of the parties' 1973 collective bar-

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2. In addition, as a result of this centralization, in or about 1976, the Railroad also installed "telecopier" facsimile equipment at a number of Terminal Service Centers and corresponding yardmasters' offices in the same city. Because of the unreliability of this facsimile equipment, its use was discontinued after a short time. This limited use of facsimile equipment, however, is also part of the subject matter of the current dispute.

gaining agreement (the Agreement), by assigning to yardmasters the task of tearing off and separating the switch lists received on the yardmasters' printers, incident to the yardmasters' other responsibilities.[3]

Rule 1 of the Agreement contains a description of the scope of work to be assigned to clerks and is commonly known as the "Scope Rule." In addition, however, Rule 1 recognizes the Railroad's right to assign various tasks to persons other than clerks, incident to their other duties, provided the total time devoted to such work does not exceed four (4) hours per day. These so-called "Incidental Work Rules" have been uniformly and consistently in the Railroad's agreements with the clerks' collective bargaining representatives since at least 1924. In relevant part, Rules 1 of the 1973 Agreement provides:

RULE 1

Positions and Employees Affected.

(a) These rules shall constitute an agreement between The Baltimore and Ohio Railroad Company . . . and the Brotherhood . . . and shall govern the hours of service, working conditions, and rates of pay of all employees engaged in the work of the craft or class of clerical, office, station and storehouse employees . . .

Assignment of Work.

(b) When the assignment of clerical work in an office, station, warehouse, freight house, store house, or yard, occurring within a spread of ten (10) hours from

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3. The Railroad also received claims, at or about the same time, contending that it had violated the same Rules by assigning to non-clerical personnel the task of picking up copies of such switch lists from baskets, after their receipt by facsimile equipment.

the time such clerical work begins, is made to more than one (1) employee not classified as a clerk, the total time devoted to such work by all such employees at a facility specified herein shall not exceed four (4) hours per day.

* * *

(c) When a position covered by this Agreement is abolished, the work assigned to same which remains to be performed will be reassigned in accordance with the following:

* * *

(2) In the event no position under this Agreement exists at the location where the work of the abolished position or positions is to be performed, then it may be performed by a Yardmaster, Foreman, or other supervisory employee, provided that less than four (4) hours work per day of the abolished position or positions remains to be performed; and further provided that such work is incident to the duties of a Yardmaster, Foreman or other supervisory employee.

* * *

(4) Work incident to and directly attached to the primary duties of another class or craft such as preparation of time cards, rendering statements or reports in connection with performance of duty, tickets collected, cars carried in trains, and cars inspected or duties of a similar character, may be performed by employees of such other craft or class.

* * *

Nothing in Rule 1 assigns the tearing off of switch lists and the separating of multi-part paper *exclusively* to clerical employees. That is the subject of this dispute.

Rule 67 of the Agreement deals generally with the use of teletype equipment, including the tearing off and sep-

arating switch lists, as a matter of *regular* clerical activity, *not* incident to other work. This rule now provides:

RULE 67

Printing Telegraph Machines.

Positions in telegraph or other offices requiring the operation of printing telegraph machines or similar devices that are used for transmitting and receiving, either or both, information, or communications of record, irrespective of title by which designated or character of services performed, shall be filled by employees coming within the scope of this Agreement.

Work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and correction of errors, shall be performed by employees covered by this Agreement.

Employees assigned as machine or device operators in relay offices shall not be required to punch or type longer than two (2) consecutive hours without a period of at least twenty (20) minutes on other work and not more than six (6) hours punching in any eight (8) hour period. Machines or device operators shall be allowed a short relief of ten (10) minutes in each four (4) hour period when requested. The remainder of the day may be assigned to other work under this Agreement.

None of the foregoing applies to the handling of train orders or Forms A or any communication with a train dispatcher.

The Agreement also includes Rule 75, which provides, in relevant part, that "Previous interpretations of Rules in this Agreement, where such Rules have been adopted un-

changed from previous Agreements, continue to apply unless in conflict with other Rules in this Agreement.''[4]

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4. While the historical roots and meaning of Rule 1 are unambiguous, the origin and purpose of Rule 67 are somewhat confusing, at least at first blush. It was this confusion, which TCU sought to engender by injecting Rule 67 into this matter, that sidetracked much of the proceedings before the NRAB.

Beginning in or about 1928, the Railroad entered into a series of agreements with the Order of Railroad Telegraphers (Telegraphers). Since the late 1930's, the Railroad has used printing teletype machines. Work on such machines was generally performed by Telegraphers. In 1945, the Railroad entered into a Memorandum of Understanding with the Telegraphers concerning the use of teletype machines.

At the same time as the Railroad signed this Memorandum of Understanding, the Railroad began to install teletype machines in some sales and yard offices, where non-telegraphers were employed. To ensure that no uncertainty would exist concerning application of the Memorandum of Understanding, in 1947, the Railroad and the Telegraphers executed a document interpreting the Memorandum.

The Telegraphers' agreement was reprinted in 1948, and the terms of the 1945 Memorandum of Understanding, together with the 1947 Interpretation, were included in the new agreement. At that time, clerical employees were covered by a separate collective bargaining agreement which contained no provision relating to handling of teletype transmissions.

Since 1948, the Railroad has had a consistent practice of allowing non-telegraphers to operate teletypes in the limited way that is the subject of this case.

As a result of increased mechanization, by 1955 the Railroad began negotiations with the Telegraphers to allow non-telegraphers to use teletype equipment to transmit train consist information and other reports from terminals located in one city to terminals located in other cities. In 1955, the Railroad and the Telegraphers reached an agreement, covering the use of teletype machines which appeared in a new collective bargaining agreement. The relevant provisions of the 1945 Memorandum of Understanding remained unaffected by the newly adopted procedures, and remained in effect throughout the Railroad, without change, until 1973.

(Continued on following page)

The claims requested compensation, on behalf of clerical employees who were already working in the Railroad's Terminal Service Centers. Many of the claims submitted by TCU acknowledged that the work sought by the clerks was "formally [sic] assigned to abolished positions," making the provisions of Rule 1 expressly applicable to those claims. Each of the claims submitted by TCU was denied by the Railroad and was handled in the usual manner, in accordance with 45 U.S.C. § 153 First (i). Because no adjustment of these disputes could be achieved in this manner, TCU petitioned the Third Division of the National Railroad Adjustment Board for review.

The first claim actually filed by TCU was the claim of one D.A. Emmerich, a clerical employee at the Railroad's Cincinnati Terminal who worked, together with a yardmaster, in a yardmaster's office. Unlike other claimants, Em-

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In 1971, the Railroad began to replace some of its old teletype machines with newer models. As a result of the Telegraphers' 1971 merger with BRAC, on the railroad industry reached a National Mediation Agreement, which allowed the Railroad to combine the clerks' and telegraphers' seniority rosters, and which permitted BRAC and the Telegraphers to select provisions from their separate agreements, without change in substance, and include those provisions in a single combined agreement. The railroads had no say in which provisions were selected.

By 1973, BRAC combined two agreements with the Railroad. The new agreement, like the previous Telegraphers' agreements, generally assigned to persons covered by the agreement work involving the use of teletype equipment, in Rule 67. However, like the previous clerks' agreements, the 1973 Agreement also contained Incidental Work Rules in Rule 1, which provided an exception to Rule 67, allowing the Railroad under certain circumstances to assign clerical work to persons other than clerks, incident to the other work of such non-clerks.

merich worked at a yardmasters' office at which all clerical positions were *not* abolished. Hence, the provisions of Rule 1(b) and 1(c) of the Agreement were not strictly applicable to Emmerich's case. The Emmerich claim was decided on July 22, 1980, by neutral referee Kasher, over the vigorous dissent of the carrier members of the NRAB.

Referee Fishgold was appointed on April 14, 1982, to adjudicate claims filed on behalf of the individual Appellants in this case. On May 18, 1982, TCU filed claims on behalf of two of its members employed at the Chicago Terminal. The Chicago claims were submitted to Referee Silagi shortly after April 1, 1983.

Both Fishgold and Silagi issued their decisions on June 28, 1984. Referee Silagi denied the Chicago claims, finding that Rule 1(b) of the 1973 Agreement, as well as the past practice of the Railroad and TCU, could not be ignored. Recognizing the "difficulty on this property in having contrary awards in different locations on the same issue on the same basic facts," Silagi felt "obliged" to reach a conclusion different from Referee Kasher in the Emmerich case, Award 22912, and stated:

> The origin of Rule 67 may not be disregarded. Said rule derived from the 1945 memorandum of understanding between B&O and Order of Railroad Telegraphers as later elucidated by the 1947 interpretation. It surfaced as Article 36 in the Telegraphers' agreement and then metamorphosed into Rule 67 in the 1973 Clerk-Telegrapher agreement. To be sure Article 36 consisted of 18 paragraphs while Rule 67 has but 4 paragraphs. Therefore Award 22912 held that the rule was not adopted unchanged on June 4, 1973. Yet a careful comparison of Article 36 with Rule 67 shows that the essential parts of the former are retained

in the latter. As noted earlier, obsolete portions and those parts which were in conflict with other rules were deleted. That being the case we are compelled to construe Rule 67 in the light of Rule 75 which enjoins upon the parties the obligation to continue to apply previous interpretations in existence prior to June 4, 1973. In contract construction a reasonable interpretation should prevail over one which leads to harsh and unjust consequences, Public Law Board No. 2895, Award No. 2 (Lieberman).

It is alleged by the Carrier, and not denied by the Organization, that since 1948, 5-ply paper had been used for the transmission of switch lists at both towers in the Barr Yard and that yardmasters tore off and separated these switch lists. It was not until subsequent to 1973 that claims were made that such work belonged to clerks. Award 22912 states that had the parties wished to preserve prior agreements they should have done so specifically. But nothing in Rule 75 negates 25 years of an unabated, unchallenged practice, Award 20514 (Lieberman). The parties own conduct for a quarter of a century simply cannot be ignored, it is the best evidence that there was no intent to terminate this minimal work assignment to yardmasters. Had they so desired they could have easily expressed that intent. Rule 67 must be read as modified by Rule 75.

Without abandoning its position that the Organization failed to show exclusivity of the work in question and that past practice must be considered the Carrier argues that the remedy of 8 hours pay is not justified. Even the remedy of 3 hours' pay, as granted by Award 22912, is not warranted for tearing off and separating 5 pieces of paper, a task which takes but a few seconds. We agree with the Carrier. It is impossible to harmonize organized labor's legitimate demand for an honest day's wages for an honest day's work with a pay claim that has the earmarks of

a lottery. The record in this case does not reveal that claimant ever performed the work in question. *This Board is not inclined to award a clerk a windfall of 8 hours pay, or even 3 hours' compensation, for services not performed and which are incidental to the work of a yardmaster. Such a claim is clearly excessive, Award 18804 (Franden) and should be denied on this ground alone.*

Having given careful consideration to the entire record, the arguments and to the awards cited by the parties, *it is the opinion of this Board that the disputed work comes within the exception contained in Rule 1(b). For all the reasons stated above the claim is denied.*[5]

In contrast to Referee Silagi, Fishgold did not mention the provisions of Rule 1(b) in his decisions. Like Silagi, Fishgold recognized the "difficulty" in reaching contrary conclusions. However, Fishgold decided to rely on the Kasher decision in Award 22912, and rejected the Railroad's arguments concerning the meaning of Rules 67 and 75. Explicitly stating that he had not disregarded "the origin of Rule 67 nor the clear intent of Rule 75," Fishgold opined:

> While the Board is not persuaded that merely because Article 36 had 18 paragraphs and Rule 67 only had 4, that Article 36 was not adopted unchanged. The Board is persuaded that, when read in conjunction with Rule 75, the failure of the parties to specifically adopt in Rule 67 the distinction between "inter-city" and "intra-city" communications evi-

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5. See, Appendix at 11-12. Reaching this conclusion, Silagi did not need to note the differences between the Cincinnati employee, Emmerich, and the employees of the Chicago Terminal, whose claims Silagi considered.

denced by the 1945 Memorandum of Understanding, undermines the Carrier's contractual argument. While the Board can accept that certain obsolete provisions pertaining to Morse telegraph and restrictions which conflicted with other rules were deleted in Rule 67 without changing the meaning of Article 36, the Board cannot conclude that the failure to continue to identify a specific distinction between "intra-city" and "inter-city" communications means that Rule 67 was unchanged from Article 36.

* * *

Finally, in this regard, the Board does not accept the Carrier's further argument that the history and practice since 1948 of allowing Yardmasters in the Barr Yard to tear off and separate these switch lists without any claims by the Clerks until after 1973, constitutes an unabated, unchallenged practice, which Rule 75 cannot negate.

* * *

Having found that the claims are to be sustained, the question arises as to what is the appropriate remedy. As in Award 22912, the Organization seeks eight (8) hours pay for work that took just a few seconds to perform, albeit on repeated occasions. This Board agrees with Referee Kasher in Award 22912 that such a remedy is inappropriate. This Board further concludes that, as in Award 22912: "A more appropriate remedy is found in the parties' Call Rule—Rule 8. Under this rule Claimant(s) should be compensated three hours since the work performed was two hours or less." . . .[6]

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6. Rule 8 of the parties' 1973 Agreement provides, in relevant part, that "Except as provided in paragraphs (b) and (c) of this Rule, regularly assigned employees notified or called to per-

(Continued on following page)

On August 14, 1984, the Railroad filed a complaint, pursuant to the Railway Labor Act, 45 U.S.C. § 153 First (q) (RLA), seeking to review the six Fishgold awards. No similar complaint was filed by TCU to review the Silagi award. However, on September 21, 1984, TCU answered the Railroad's complaint and filed a counterclaim, petitioning the District Court to enforce the awards entered by the Fishgold panel. The Railroad answered the counterclaim and, on March 1, 1985, moved the Court for summary judgment. TCU filed its own motion for summary judgment on February 21, 1985.

On September 12, 1985, an initial hearing on the cross-motions for summary judgment was held before District Judge J. Frederick Motz. Demonstrating great care in exercising his jurisdiction under the RLA, Judge Motz wrote counsel for the parties on October 8 and again on November 18, 1985, requesting that they address in writing certain additional questions bearing on the decision. After counsel responded, an additional hearing on the motions was held on January 24, 1986.

Finding that the Fishgold panel had exceeded its jurisdiction, had rewritten the Agreement, and had contravened its essence and purpose, "by simply omitting one of

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form work not continuous with, before, or after the regular work period or on their designated rest days other than Sundays or specified holidays shall be allowed a minimum of three (3) hours for two (2) hours' work, or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis." The Rule continues to provide that "Regularly assigned employees who have completed their work period for the day and been released from duty, required to return for further service, may be paid as if on continuous duty."

its critical provisions", Judge Motz vacated the awards entered by the Fishgold panel. In addition, Judge Motz found that these awards were not compensatory, but punitive in nature, and that, "by awarding penalty pay the Fishgold panel was merely 'dispensing its own brand of industrial justice', rather than following the Agreement. As a result, the court granted the Railroad's motion for summary judgment and denied TCU's. TCU appealed to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit affirmed. Fully recognizing "that the scope of review of an NRAB decision is among the narrowest known to law," and that such decisions may only be set aside under the three restricted circumstances set forth in 45 U.S.C. § 153 First (q), the Court applied well established principles:

> That the scope of review is highly restricted, however, does not mean that courts may never set aside an NRAB award. Awards may be set aside if they are wholly baseless and completely without reason, *Gunther v. San Diego and Arizona Railway Co.*, 383 U.S. 257 (1965); if they are actually and indisputedly without foundation in reason or fact, *Brotherhood of Railroad Trainmen v. Central Georgia Railway Co.*, 415 F.2d 403 (5th Cir. 1969); or if the NRAB decision fails to draw its essence from the collective bargaining agreement, *International Association of Machinists v. So. Pac. Transp.*, 626 F.2d 215 (9th Cir. 1980); *BRAC v. Kansas City Terminal Ry. Co.*, 587 F.2d 903 (8th Cir. 1978); *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970).
>
> The NRAB exceeds its jurisdiction when there is manifest disregard of the collective bargaining agreement, *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969), or when an award fails to take into account any existing common law of the particular

plant or industry, *Norfolk Shipping & Dry Dock v. Local No. 684*, 671 F.2d 797 (4th Cir. 1982). A collective bargaining agreement is more than a contract, it is a generalized code to govern the myriad cases which the draftsman cannot anticipate. *United Steel Workers of America v. Warrior and Gulf N. Co.*, 363 U.S. 574 (1960). This generalized focus does not however, permit an arbitrator to rewrite the provisions of the collective bargaining agreement. *See, e.g., Mistletoe Express Service v. Motor Expressmens Union*, 566 F.2d 692 (10th Cir. 1977); *W.R. Grace & Co. v. Local Union 759*, 652 F.2d 1248 (5th Cir. 1981). Thus, this court has held that where an arbitrator fails to discuss, in his decision, critical contract terminology, which might reasonably require the opposite result, the award cannot be said to draw its essence from the contract. *Clinchfield Coal v. District 28, UMW*, 720 F.2d 1365 (4th Cir. 1983).

In the instant case, the NRAB panel noted that B&O had raised the Scope Rule issue but then the panel failed to provide any discussion or analysis of that issue. Even a cursory reading of the relevant sections of the Scope Rule would lead the reader to believe that those practices which BRAC now challenges are completely proper under the collective bargaining agreement. Because the NRAB panel has provided no explanation of either the Scope Rule provisions at issue here, or their applicability to the instant case, *Clinchfield Coal, supra,* requires that the panel's decision be vacated.

Because this holding conforms to the prior decisions of this Court, and because there is no conflict between the Fourth Circuit's decision in this case and the decisions of other circuits, TCU's petition for a writ of certiorari should be denied.

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REASONS FOR DENYING THE WRIT

I.

Although this Court has stated that the standard of judicial review established by the Railway Labor Act is a narrow one, *Union Pacific Railroad v. Sheehan*, 439 U.S. 89, 91 (1978), it has never held that decisions of the NRAB are beyond all judicial review, or that the federal courts must uphold every award, no matter how egregious.[7] To the contrary, this Court has construed the "jurisdictional" provision of 45 U.S.C. § 153 to require that NRAB awards be set aside if they are "wholly baseless and completely without reason," *Gunther v. San Diego & Arizona E. Ry. Co.*, 383 U.S. 257, 261 (1965), *cited in Sheehan, supra*, 439 U.S. at 93. Indeed, for a court to uphold a wholly baseless award would raise constitutional problems under Article III, which guarantees the right to judicial review. *See, Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, 102 S.Ct. 2858 (1982).

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7. Here, as in *Clinchfield Coal, supra*, 720 F.2d at 1370, the Union has argued that the provisions of 45 U.S.C. § 153 foreclose all judicial review of arbitration. Here, as in *Clinchfield*, the Union's argument "goes too far." Judicial deference to arbitration does not grant *carte blanche* approval to any decision that an arbitrator may issue. *Piggly Wiggly Operators' Warehouse, Inc. v. Piggy Wiggly Operators' Warehouse Independent Truck Drivers Union, Local No. 1*, 611 F.2d 580, 583 (5th Cir. 1980); *Int'l Ass'n of Mach. v. Hayes Corp.*, 296 F.2d 238, 243 (5th Cir. 1961). The integrity of the NRAB arbitration process and the public interest in having management-labor disputes resolved without unnecessary judicial involvement is fully protected by the limited standard of review described by this Court in *Gunther, Sheehan* and similar cases, as well as the *Steelworkers Trilogy*, upon which *Clinchfield* relied. *See, Clinchfield*, 720 F.2d at 1370.

The NRAB, like an arbitrator, is "confined to interpretation and application of the collective bargaining agreement; [it] does not sit to dispense [its] own brand of industrial justice." *See, United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *United Food & Commercial Workers, Local No. 222 v. Iowa Beef Processors, Inc.*, 683 F.2d 283, 285 (8th Cir. 1982). While an arbitrator or the NRAB "may of course look for guidance from many sources . . . his award is legitimate only so long as it draws its essence from the collective bargaining agreement. *When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.*" *Enterprise Wheel, supra*, 363 U.S. at 597 (emphasis added).

Properly construing the "jurisdictional" provision of 45 U.S.C § 153 First (q), the lower courts have repeatedly held, without question by this Court, that an NRAB award may be set aside "for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the divisions jurisdiction," if an award is "actually and indisputedly without foundation in reason or fact," *Bhd. of R.R. Trainmen v. Central of Ga. Ry. Co.*, 415 F.2d 403, 410 (1969); or if it fails to "draw its essence from the collective bargaining agreement." *Id.*, 415 F.2d at 412. *See, also, Int'l Ass'n of Mach. v. So. Pac. Transp.*, 626 F.2d 715, 717 (9th Cir. 1980); *Bhd. of Ry. Airline & Steamship Clerks v. Kansas City Terminal Ry. Co.*, 587 F.2d 903, 906 (8th Cir. 1978); *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228, 233-34 (5th Cir. 1970); *Koloedey v. Mutual Beneficial Ass'n, etc.*, 526 F.Supp. 1158, 1161 (D. Del. 1981); *U.T.U. v. Pittsburgh*

Charters & Y. Ry. Co., 353 F.Supp. 1305, 1306 (W.D. Pa. 1973).

The NRAB acts outside its jurisdiction when there is "manifest disregard of the agreement", *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969); or when an award fails to "take into account any existing common law of the particular plant or industry." *Norfolk Shipbuilding & Drydock v. Local No. 684*, 671 F.2d 797, 799-800 (4th Cir. 1982). Arbitrators have frequently recognized restrictions on their own powers and have acknowledged that they may not re-write the provisions of the contract upon which the parties have agreed. *See, e.g., Schotts Bakery, Inc.*, 69-1 ARB ¶ 8118, at 3397; *Wilner Wood Company*, 69-2 ARB ¶ 8734, at 5498 and *Champion Papers, Inc.*, 69-1 ARB ¶ 8341, at 4168. Similarly, the federal courts have held that an arbitrator may not re-write a labor contract. *See, e.g., Int'l U. of Operating Eng., Local No. 9 v. Shank-Artukovich*, 751 F.2d 364, 366 (10th Cir. 1985) (if the arbitrator does not follow the express terms of the agreement, his ruling cannot stand); *Gen'l Drivers, Warehousemen v. Hays & Nicoulin*, 594 F.2d 1093, 1094 (6th Cir. 1979); *Detroit Coil v. Int'l Ass'n of Mach.*, 594 F.2d 575, 579 (6th Cir. 1979) (an arbitrator is without authority to disregard or modify plain and unambiguous provisions of an agreement); *Monongahela Power Co. v. Local No. 2332, IBEW*, 566 F.2d 1196, 1199 (4th Cir. 1976) (an arbitrator is without authority to disregard or modify plain and unambiguous provisions); *Mistletoe Exp. Serv. v. Motor Expressmens Union*, 556 F.2d 692, 695 (10th Cir. 1977) (an arbitration award will not be upheld when it contravenes the express language of the labor contract); *Timken Co. v. Local No. 1123*,

United Steel Wrkrs., 482 F.2d 1012, 1015 n.2 (6th Cir. 1973) ("It is axiomatic that if the arbitrator undertook to, in effect, amend the contract, to substitute his own discretion for that of the parties or to dispense 'his own brand of industrial justice,' the enforcement of the award must be denied."); *Textile Workers Union v. American Thread Co.*, 291 F.2d 894, 899 (4th Cir. 1961).

The Union has sought to manufacture confusion from this consistent line of federal cases, which have faithfully applied the clear and unambiguous holdings of this Court. While citing both *Sheenan* and *Gunther*, TCU has suggested that this Court has not yet construed the "jurisdictional" provision of 45 U.S.C. § 153, and that "the court of appeals would have been less likely to reach the result it did [in this case] . . . if it had been bound by a decision of this Court definitively construing the dispositive statutory language." *Petition*, at 13, 18. The Union's argument only reflects its dissatisfaction with the result which the Fourth Circuit did reach in this case. As this Court held in *Gunther*, and repeated in *Sheehan*, and as the Fourth Circuit recognized in this case, the "jurisdictional" provision of 45 U.S.C. § 153 "means just what it says." *Id.*, 439 U.S. at 93. Contrary to TCU's suggestions, this Court has already construed the "jurisdictional" provision of 45 U.S.C. § 153 on several occasions. The lower federal courts need no further guidance concerning its meaning.

The decision in this case did nothing more or less than apply well recognized principles. The Fourth Circuit explicitly recognized and applied the prior decisions of this Court which limit the role of federal courts in reviewing NRAB awards. Confining itself within those narrow limits,

the Court of Appeals nevertheless properly concluded that these limitations upon the federal courts' scope of review do not mean that courts may never set aside an NRAB award. It held that, even though a labor contract is a generalized code to govern the myriad cases which the draftsman cannot anticipate, this generalized focus does not permit an arbitrator to rewrite the provisions of the collective bargaining agreement. The Fourth Circuit appropriately concluded that, even under this Court's most restrictive rulings, awards may be set aside if they are wholly baseless and completely without reason, if they are actually and indisputedly without foundation in reason or fact, or if they fail to draw their essence from the collective bargaining agreement. *See,* Petitioner's Appendix C, at 7a-9a. In short, the decision in this case did not conflict with the opinions of this Court dealing with judicial review of NRAB awards. Rather, that decision was in full conformity with *all* of the prior holdings of this Court.

II.

The legislative history of 45 U.S.C. § 153 establishes that Congress intended for the courts to exercise the same authority to review NRAB decisions which apply to review of arbitration awards. *See, Central of Ga.,* 415 F.2d at 410-12.[8] When considering 1966 amendments to the RLA,

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8. *See, also, Atchison, Topeka & Santa Fe Ry. Co. v. Buell,* 107 S.Ct. 1410, 1414, — U.S. — (1987) (referring to the NRAB and Public Law Boards as arbitration boards); *Andrews v. Louisville & Nashville Railroad Co.,* 406 U.S. 320, 322 (1972) (finding the record "convincing" that provisions of the RLA "dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field"); and *Gunther, supra,* 382 U.S. at 263 (stating that the Court has given NRAB decisions "the same finality that a decision of arbitrators would have"). In *Cen-*

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the *Central of Ga.* court noted, the Senate Labor and Public Welfare Committee stated that the grounds for review of NRAB awards "should be limited to those grounds commonly provided for review of arbitration awards." The Committee continued:

> The committee gave consideration to a proposal that the bill be amended to include as a ground for setting aside an award "arbitrariness or capriciousness" on the part of the Board. The committee declined to adopt such an amendment out of concern that such a provision might be regarded as an invitation to the courts to treat any award with which the court disagreed as being arbitrary or capricious. *This was done on the assumption that a Federal court would have the power to decline to enforce an award which was actually and indisputedly without foundation in reason or fact, and the committee intends that, under this bill, the courts will have that power.* The limited grounds for judicial review provided in H.R. 706 are the same grounds that are provided in section 9 of the Railway Labor Act and also Public Law 88-108, which provided arbitration for the so-called work rules dispute. [1966] U.S. Code Cong. & Admin. News, p. 2287.

Central of Ga., 415 F.2d at 410.

Applying these Congressionally mandated standards, the courts have set aside the decisions of the NRAB or arbitrators when an award has ignored clear and express

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tral of Ga., supra, the court quoted the Senate Report concerning the 1966 amendments to the RLA, as follows: "Also, because the National Railroad Adjustment Board has been characterized as an arbitration tribunal by the courts, the grounds for review should be limited to those grounds commonly provided for review of arbitration awards." *Id.*, 416 F.2d at 410. The Senate Report thereafter quoted the three grounds for review of NRAB awards set forth in 45 U.S.C. 153.

contractual provisions. Such awards have been set aside most often when an arbitrator has declined to sustain an employee's discharge from service, when such discharge was expressly contemplated by the applicable collective bargaining agreement. *See, e.g., Morgan Services, Inc. v. Local 323, etc.*, 724 F.2d 1217, 1222-23 (6th Cir. 1984); *General Drivers, Etc. v. Haynes and Nicoulin, Inc., supra; Mistletoe Express Service, supra,* 566 F.2d at 695 (overturning award that disregarded clear language allowing discharge without "progressive discipline" because award violated essence of agreement). *See, also, Amanda Bent Bolt Company v. International Union, Etc.*, 451 F.2d 1277, 1279-80 (6th Cir. 1971); *Truck Drivers and Helpers Union v. Ulry Talbert Company,* 330 F.2d 562 (8th Cir. 1964). *See, especially, Wilson v. Chicago & N.W. Transp. Co.*, 728 F.2d 963, 967 (7th Cir. 1984) (NRAB exceeded its authority by ignoring provisions mandating dismissal of charges for railroad's failure to comply with contractually specified time limits.)

However, the issue has also arisen outside the discharge area. *See, e.g., Sears Roebuck Company v. Teamsters Local Union No. 243,* 683 F.2d 154 (6th Cir.), *cert. denied,* 103 S.Ct. 1274 (1982) (arbitrator improperly rewrote contract disregarding express provision giving employer right to subcontract work); *Detroit Oil Company, supra,* 594 F.2d at 579-81 (disregard of contractual notice for grievances constitutes "clear failure to draw the essence of the award from the agreement"); *Industrial Mutual Association v. Amalgamated Workers,* 725 F.2d 406, 411 (6th Cir. 1984) (disregard of plain contract provision placing liability for shortages in accounts).

The decision in *Clinchfield Coal,* upon which both the trial court and the Fourth Circuit relied, held that where "the arbitrator fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw its essence from the contract." *Id.*, 720 F.2d at 1368-69. This holding is fully consistent with the long series of federal cases which have held that an arbitrator may not re-write a labor contract, and that if an arbitrator does not follow the express terms of the agreement, his ruling cannot stand. *See, e.g., Int'l U. of Operating Eng., Local No. 9 v. Shank-Artukovich, supra; Gen'l Drivers, Warehousemen v. Hays & Nicoulin, supra; Detroit Coil v. Int'l Ass'n of Mach., supra; Monongahela Power Co. v. Local No. 2332, IBEW, supra; Mistletoe Exp. Serv. v. Motor Expressmens Union, supra; Timken Co. v. Local No. 1123, United Steel Wrkrs., supra; Textile Workers Union v. American Thread Co., supra.*

Both the trial court and the Fourth Circuit decisions in this case found that Referee Fishgold was made fully aware of the unambiguous terms of Rules 1(b) and (c) of the 1973 agreement, by both parties' *ex parte* submissions to the NRAB. Rule 1(b) provides a general exception to all parts of the 1973 Agreement, applicable by the parties' practice only at facilities where no clerk is employed. Rule 1(b) authorizes the assignment of clerical work to persons other than clerks when, during a period of 10 hours after any such clerical work is begun by a non-clerk, the total amount of time devoted to clerical work by non-clerks is less than four (4) hours. Similarly, Rule 1(c) provides a general exception to all parts of the 1973 Agreement, ex-

pressly applicable when, as here, clerical positions are abolished. Rule 1(c) authorizes the assignment of clerical work to non-clerks, including yardmasters, where no clerical position exists at the location where the work of the abolished clerical position is to be performed, provided the clerical work is incident to the duties of the non-clerk and takes less than four (4) hours per day.

The referee was well aware that the claims which he considered were, in the Union's words, concerned with work which was "formally [sic] assigned to abolished positions." Application of Rules 1(b) and (c) was clear since the disputed work "took a few seconds to perform, albeit on repeated occasions," and, therefore, did not exceed four hours per day; because the work was performed by yardmasters incident to their duties; and since no positions covered by the 1973 Agreement exist at the locations where the claimed work of the abolished positions was performed. Nevertheless, as the trial court and the Fourth Circuit correctly found, the Fishgold decisions failed completely to mention, let alone consider, the terms of Rules 1(b) and (c).[9]

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9. TCU suggests that the trial court somehow ignored his proper role and conducted a *de novo* review of the Fishgold decisions, because the trial court sought diligently to understand the distinction between "major" and "minor" disputes under the RLA. *Petition,* at 6. Judge Motz readily expressed his own lack of familiarity with RLA concepts, stating "that is something which I really need advice of counsel who are knowledgeable in the area . . . ". In the succeeding minutes of the hearing quoted by TCU, however, Judge Motz clearly stated his understanding of his "job"—"to apply the law and I am, my mind is not—my mind is quite open as to what the final outcome of this case should be." Counsel for the Railroad clarified the distinction

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Notwithstanding TCU's efforts to distinguish this case, the Fishgold panel's decisions are like that of the arbitrator in *Clinchfield Coal, supra,* and similar cases. In *Clinchfield,* as here, the union argued that, by mentioning an issue, without further discussing it, in his list of questions raised by the employer, the arbitrator must have considered the employer's position and rejected it, although his decision did not develop his reasons in detail. *Id.,* 720 F.2d at 1369. There, as here, the union's argument was "wholly unsatisfactory for it would allow an arbitrator to shield his award simply by the ruse of stating an issue without discussing it." *Id.* This case, like *Clinchfield Coal,* is one where the arbitrator failed to discuss "critical contract terminology," which would necessarily lead to an opposite result, and where the arbitrator thus rendered an award which "cannot be considered to draw its essence from the contract." *Id.*

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between major and minor disputes under the RLA, a distinction which the court quickly grasped. Counsel for the Railroad then engaged in argument about the appropriate standards of review and their application in this case. Judge Motz indicated his complete understanding of the limits of his authority, stating, in response to counsel's argument, that if the arbitrator had to be cautious about "dispensing his own brand of industrial justice", the court had to be "even more cautious". Judge Motz added that "the fact that [he] think[s] its senseless is something that [he] had better examine [his] conscience very closely to think [he's] just not relating [sic] the contract or overturning the arbitrator's decision because of what [his] view is, right or wrong." While those remarks may show that Judge Motz "agonized" over the decision which he rendered, as the Union averred before the Fourth Circuit, they also show the great care which he brought to bear in reaching the correct result, and completely disprove the Union's contention that the trial court and the Fourth Circuit conducted a *de novo* review of the challenged Fishgold decisions.

By ignoring Rules 1(b) and 1(c) the Fishgold decisions did not simply commit "error", or contain some "ambiguity". *Petition,* at 11-12.[10] Rather, by ignoring "critical contract terminology", *Clinchfield Coal,* 720 F.2d at 1369, the Fishgold decisions showed a "manifest disregard of the agreement," *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d at 1128; effectively "attempted to alter the existing agreement," *Wilson v. Chicago & N.W. Transp. Co.,* 728 F.2d at 967; and failed to "draw [their] essence" from the Agreement. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.,* 363 U.S. at 597; *Central of Ga.,* 415 F.2d at 412. As a result, as both the trial court and the Court of Appeals correctly found that, by ignoring Rules 1(b) and 1(c) of the parties agreement, the Fishgold panel exceeded the authority of the NRAB and violated the terms of the Railway Labor Act, within the meaning of 45 U.S.C. § 153 First (q).

In sum, the decision of the Fourth Circuit in this case did not conflict with the decisions of other Courts of Ap-

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10. Even a cursory review of Judge Motz' decision demonstrates that the District judge did not, as TCU contends, vacate the Fishgold decisions on the basis that the NRAB had misinterpreted the contract. Instead, Judge Motz' opinion rests on the obviously correct premise that Fishgold *ignored* Rule 1 and that "by ignoring Rule 1 the panel contravened the essence and purpose of the 1973 agreement." Hence, Judge Motz properly considered the reasons given by the referee, as well as evidence available to assist the court in determining whether the referee's award drew its essence from the Agreement. Such consideration does not violate any of the standards of review established by Congress and the courts. To the contrary, if Judge Motz had failed to make these determinations, he would have abdicated his judicial responsibility, in the words of Congress, "to decline to enforce an award which was actually and indisputedly without foundation in reason or fact . . ." [1966] U.S. Code Cong. & Admin. News, p. 2287, *quoted in Central of Ga.,* 415 F.2d at 410.

peals which have interpreted 45 U.S.C. § 153. To the contrary, both the decision of the trial court and the opinion of the Fourth Circuit were fully consistent with the decisions of other courts. No conflict exists among the circuits which must be resolved by this Court. Full review of the Union's petition should thus be denied.

CONCLUSION

For the foregoing reasons, the Respondent, the Baltimore & Ohio Railroad Company, respectfully submits that the decision of the United States Court of Appeals for the Fourth Circuit was correct, and that the Petition of the Transportation Communications Union for a Writ of Certiorari to review that decision should be denied.

Respectfully submitted,

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APPENDIX

NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24881
Docket Number CL-24747

THIRD DIVISION

Robert Silagi, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and Station
(Employes
(
(Baltimore and Ohio Chicago Terminal Railroad
(Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood (GL-9630) that:

(1) Carrier violated, and continues to violate, Clerk-Telegrapher Agreement beginning with the claim date of June 1, 1981, when it caused and permits employees not covered by said Agreement to perform work and functions in connection with the operation of printing telegraph (teletype) machines and similar devices used for transmitting and receiving communications, including tearing off and separating message reports of cars, at Ashland Avenue and Halsted Street Towers; two (2) locations at Barr Yard, Chicago, Illinois and

(2) As a result of such impropriety, Carrier shall be required to compensate Clerk M. A. Gasper, Barr Yard, Chicago, Illinois, eight (8) hours pay commencing June 1, 1981, and continuing each subsequent date until the foregoing violations of the Agreement cease, and

(3) That Carrier shall also, because of its violative action, compensate Clerk F. Neilson, Barr Yard, Chicago, Illinois, eight (8) hours pay beginning June 1, 1981, and continuing each subsequent date until Carrier ceases to violate the Clerk-Telegrapher Agreement at Barr Yard, Chicago, Illinois, as heretofore described.

OPINION OF BOARD: The issue presented in this dispute is whether the tearing off and separating of 5-ply message reports of cars from teletype machines by yardmasters contravenes Rule 1—Scope, Rule 18—Installation of Machines or Rule 67—Printing Telegraph Machines. The relevant portions of said rules are quoted below.

"Rule 1—Positions and Employees Affected.

(a) These rules shall constitute an agreement between the Baltimore and Ohio Railroad Company, The Baltimore and Ohio Chicago Terminal Railroad Company, and The Staten Island Railroad Corporation and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees and shall govern the hours of service, working conditions, and rates of pay of all employees engaged in the work of the craft or class of clerical, office, station and storehouse employees, which shall include all employees formerly covered by clerical agreement effective July 1, 1921 (as revised December 15, 1969) as amended, and all employees engaged in the work of the craft or class of Transportation-Communication Employees, which shall include all employees formerly covered by the Transportation-Communication Agreements: The Baltimore and Ohio Railroad Company effective July 1, 1928, as revised June 16, 1960, as amended; The Baltimore and Ohio Chicago Terminal Railroad Company effective June

3, 1963, as amended; and The Staten Island Railroad Corporation effective August 1, 1959, as amended."

"Rule 1(b)—Assignment of Work

When the assignment of clerical work in an office, station, warehouse, freight house, store house, or yard, occurring within a spread of ten (10) hours from the time such clerical work begins, is made to more than one (1) employee not classified as a clerk, the total time devoted to such work by all employees at a facility specified herein shall not exceed four (4) hours per day."

"Interpretation of Rule 1(b)

The word 'employee' in Rule 1(b) means one in the employ of this Company, whether coming under the Scope of this Agreement, another agreement, or outside the Scope of any agreement."

"Rule 18—Installation of Machines.

(a) When and where new types of machines or mechanical devices of any kind are used for the purpose of performing work previously handled by such machines, coming within the Scope of this Agreement, sucuh work will be assigned to employees covered by this Agreement."

"Rule 67—Printing Telegraph Machines.

Positions in telegraph or other offices requiring the operating of printing telegraph machines or similar devices that are used for transmitting and receiving either or both, information, or communications of record, irrespective of title by which designated or character or services performed, shall be filled by employees coming within the scope of this Agreement.

Work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and

correction of errors, shall be performed by employees covered by this Agreement."

The Organization relies heavily upon Rule 67, second paragraph, which assigns to Clerks the work of "tearing off and separating messages and reports". Such language is, in the Organization's view, "explicit unambiguous, certain, definite and unequivocally clear", consequently it demands an absolute right to insist upon compliance with the Rule. Conflicting past practices are material and relevant in the interpretation and application of a contract only when its terms are ambiguous (Awards 21130—Blackwell; 18287—Dorsey; 18064—Quinn; and 14338—Perelson). Finally the Organization maintains that sustaining Award 22912 (Kasher), a case identical with the one at bar, is dispositive of the issue. It is, therefore, self evident that tearing off switch lists from printing teletype machines in Barr Yard and separating the 5-ply paper messages is work which must be done by Clerks and none others.

The Carrier's argument is three-fold: (a) that the Organization failed to sustain its burden of proving exclusive right to the work in question, (b) that even if such right exists, there is an exception under Rule 1(b), and (c) that Award 22912 (Kasher) has no precedential value.

To better understand the arguments of the parties the history of the dispute must be examined. A synopsis of the history follows:

Prior to the mid-1930's Morse key telegraph operators transmitted administrative messages on Carrier's sister railroad, the Baltimore and Ohio Railroad Company

(B&O). In the late 1930's printing teletype machines were installed. The operation of the machines was a completely new assignment. In 1945 B&O and Order of Railroad Telegraphers entered into a memorandum of understanding assigning such work to telegraphers. Section 5 of said memorandum is almost identical with the second paragraph of Rule 67, supra. About this time the Carrier began to install printing teletype machines in some of its B&O yard offices where non-telegraph employees used this equipment to transmit reports and messages. These reports and messages were transmitted from Yard and Sales offices to a relay office in the same terminal where telegraphers retransmitted this information to other terminals. At the B&O Cincinnati Terminal the Telegraphers claimed exclusive rights to operate the teletype machines. To avoid misunderstanding, in 1947 the parties executed an interpretation of their first memorandum. The parties agreed that:

> "This Memorandum of Understanding does not apply to intra-city communication by direct key-board teletype machines in offices where Morse telegraph has never been in use and the communication service prior to the installation of teletype was being handled by telephone or messenger.
>
> Where intra-city communication by machines referred to in the above Memorandum of Understanding is performed by other than employees coming within the Scope of the Telegraphers' Agreement, the business so handled except wheel reports, shall not be transmitted by reperforator tape to intra-city points."

In 1948 the B&O Telegrapher's Agreement was reprinted. The 1945 memorandum of agreement and its 1947

interpretation appeared as Article 31 of the new agreement.

In 1948 the Carrier installed printing teletype machines in the Yardmasters' Towers in Barr Yard. Such machines were also installed in the Barr Yard Office where non-telegraphers used them to transmit switch lists to the yardmasters at their towers in Barr Yard. At both towers yardmasters tore off the switch lists from the machines in their offices and separated the 5-ply papers. No dispute arose between Carrier and Telegraphers nor between Carrier and the Organization as to the right of yardmasters to do these tasks. At this time the telegraphers in Chicago Terminal were covered by a different working agreement than that governing employes on the B&O. Said agreement did not contain the equivalent of Article 31. Clerical employes on both properties were covered by the same working agreement which contained no rule whatever dealing with the handling of teletype transmissions.

In the mid-1950's Carrier installed teletype equipment in yard offices throughout its system. In 1955 Carrier and Telegraphers negotiated a revision of Article 31 to cover employes of the Carrier. The Telegraphers' agreement covering B&O employes was reprinted in 1960 with the 1955 revision of Article 31 appearing as Article 36 which reads in pertinent part:

> "Printing Telegraph Machines.
>
> (a-1) Positions in telegraph or other offices requiring the operation of printing telegraph machines . . . shall be filled by employees coming within the scope of the Telegraphers' Agreement . . . except as herein provided. In offices, other than telegraph offices, persons not coming within the scope of the Telegraphers'

Agreement may operate machines . . . for transmitting or receiving information directly to or from telegraph offices in the same terminal. Such persons may operate such machines . . . for transmitting information . . . or receiving information . . . to or from offices, other than telegraph offices when the information is confined to reports of the movement of cars to or service messages concerning transmission errors, corrections or modifications . . .

(e) Except as provided in paragraph a-1, work in connection with the operation of transmitting, reperforating and receiving units, including tearing off and separating messages and reports, checking and correction of errors, shall be performed by employees covered by the Telegraphers' Agreement. In emergency cases, individuals used for such service will not establish seniority."

In 1963 the agreement between Carrier and Telegraphers was reprinted. Article 36, above, appeared as Article 2 with two deletions not relevant hereto. After the 1955 agreement was extended to cover employees of the Carrier no complaint was made by the Brotherhood in regard to the use of yardmasters to tear off or to separate the switch lists sent to them by personnel in the Barr Yard office.

In 1966 Carrier installed a computer at Barr Yard which maintained a perpetual freight car inventory of all cars within defined limits at Chicago Terminal. Yardmasters continued to receive switch lists from Barr Yard office by teletype. In 1971 these machines were replaced by Kleinschmidt Receive Only Printers and in the following year Data Fax machines were added. Since then employes in the Barr Yard office have sent switch lists to

yardmasters by use of the Kleinschmidt and Data Fax machines.

In 1972, negotiations began regarding the consolidation of Clerk-Telegrapher work. The eventual result of such negotiations was the current consolidated Clerk-Telegrapher Agreement, effective June 4, 1973. Article 36 of the former B&O Telegraphers' agreement was incorporated into the consolidated agreement, however, deleted therefrom were certain obsolete provisions pertaining to Morse telegraph and restrictions which conflicted with other rules. The revised Article 36 appeared as Rule 67, reproduced above. In order to provide a continuum of interpretations of the rules extracted from former contracts the consolidated agreement of 1973 contains Rule 75:

> "This Agreement supersedes previous Collective Bargaining Agreements, and interpretations thereof, between the parties, and existing Circulars, Memoranda of Agreement and Letters of Agreement are cancelled unless otherwise agreed between the parties. Previous interpretations to Rules in this Agreement, where such Rules have been adopted unchanged from previous Agreements, continue to apply unless in conflict with other Rules in this Agreement. Effective National Agreements remain in effect unless, or until, changed in accordance with Railway Labor Act, as amended."

In 1974 Carrier began to open Terminal Service Centers at various locations throughout its system. In most cases these new data centers consolidated yard and agency personnel into one central point leaving only yardmasters in the individual yards. Wherever a Terminal Service Center was opened, Kleinschmidt Receive Only Printers were placed in the yardmasters' offices so that they could

receive switch lists. At each such location yardmasters tore off the lists and separated the copies. Thereafter Carrier began to receive claims that such work should be assigned to Clerks pursuant to Rule 67. Since the dispute could not be resolved on the property, the Organization progressed a December 1975 claim in the Cincinnati yard office and presented it to this Board for adjudication. The Board sustained the claim in Award 22912 (Kasher) which, however, reduced the claim of eight hours' pay "for work that took just a few seconds to perform" to a three-hour call.

The Organization argues forcefully that the merger of the Clerks' and Telegraphers' crafts in 1973 guaranteed to employes covered by the joint Clerk-Telegrapher agreement the exclusive right to perform all work in all offices involving teletype machines including tearing off and separating messages. The Organization acknowledges that hundreds of demands for eight hours' pay based upon claimed violations of Rule 67 were submitted and held in abeyance pending a decision in Award 22912. The Organization asserts that Carrier bargained in bad faith when it refused to honor Award 22912 and apply it to the pending identical claims. The Organization attacks Carrier's reference to former Telegraphers' Agreements with Carrier as outmoded for over 30 years. The Organization also claims that the disputes as to "communication work" over the years was between Clerks and Telegraphers and not with Yardmasters, nor have Yardmasters ever contended for such work. Moreover, the Organization points out that although the Railroad Yardmasters of America were named as an interested third party in the proceedings in the claim leading to Award 22912, the Yardmasters elected

not to participate in that case. Nor are the Yardmasters making any claim to the disputed work in the instant case. The Organization rejects the notion that any portion of the operation of a teletype machine, no matter how slight, may be splintered from the jurisdiction of the Clerks, citing Awards 1501 (Shaw) and 2282 (Fox).

The Carrier argues with equal vigor that Award 22912 must be overturned. The doctrine of stare decisis, says the Carrier, is not absolute and should not be followed when an award is palpably erroneous. The history of collective bargaining must be given due consideration. Past practice is an important element in disclosing how the parties themselves interpreted their agreement. In any event claimant's demand for 8 hours' pay is harsh and excessive.

Continuity in the interpretation of contract rules is highly desirable. Such interpretations should not be overruled without strong and compelling reasons, Public Law Board No. 1790, Award No. 98 (Dolnick). Award 22912 involved the Cincinnati Terminal of the Carrier. Nevertheless, there is no honest way to distinguish the decision in this dispute from that decision. The parties are the same, the agreement is the same and the facts virtually identical. Certainly there will be difficulty on this property in having contrary awards in different locations on the same issue under the same basic facts. But it is preferable in the overall interest of the parties to give the best direction to the parties, as this Board sees it, as to how the rule should be applied, rather than follow the precedent set in another award, particularly as that decision is recent and, therefore, could not have developed substantial precedent, Award 22024 (Ables). With due deference to

the distinguished referee who wrote the opinion in Award 22912 and to the members of this Board who concurred in his views, we feel obliged to reach a different conclusion for the following reasons:

The origin of Rule 67 may not be disregarded. Said rule derived from the 1945 memorandum of understanding between B&O and Order of Railroad Telegraphers as later elucidated by the 1947 interpretation. It surfaced as Article 36 in the Telegraphers' agreement and then metamorphosed into Rule 67 in the 1973 Clerk-Telegrapher agreement. To be sure Article 36 consisted of 18 paragraphs while Rule 67 has but 4 paragraphs. Therefore Award 22912 held that the rule was not adopted unchanged on June 4, 1973. Yet a careful comparison of Article 36 with Rule 67 shows that the essential parts of the former are retained in the latter. As noted earlier, obsolete portions and those parts which were in conflict with other rules were deleted. That being the case we are compelled to construe Rule 67 in the light of Rule 75 which enjoins upon the parties the obligation to continue to apply previous interpretations in existence prior to June 4, 1973. In contract construction a reasonable interpretation should prevail over one which leads to harsh and unjust consequences, Public Law Board No. 2895. Award No. 2 (Lieberman).

It is alleged by the Carrier, and not denied by the Organization, that since 1948, 5-ply paper had been used for the transmission of switch lists at both towers in the Barr Yard and that yardmasters tore off and separated these switch lists. It was not until subsequent to 1973 that claims were made that such work belonged to clerks.

Award 22912 states that had the parties wished to preserve prior agreements they should have done so specifically. But nothing in Rule 75 negates 25 years of an unabated, unchallenged practice, Award 20514 (Lieberman). The parties own conduct for a quarter of a century simply cannot be ignored, it is the best evidence that there was no intent to terminate this minimal work assignment to yardmasters. Had they so desired they could have easily expressed that intent. Rule 67 must be read as modified by Rule 75.

Without abandoning its position that the Organization failed to show exclusivity to the work in question and that past practice must be considered, the Carrier argues that the remedy of 8 hours' pay is not justified. Even the remedy of 3 hours' pay, as granted by Award 22912, is not warranted for tearing off and separating 5 pieces of paper, a task which takes but a few seconds. We agree with the Carrier. It is impossible to harmonize organized labor's legitimate demand for an honest day's wages for an honest day's work with a pay claim that has the earmarks of a lottery. The record in this case does not reveal that claimant ever performed the work in question. This Board is not inclined to award a clerk a windfall of 8 hours' pay, or even 3 hours' compensation, for services not performed and which are incidental to the work of a yardmaster. Such a claim is clearly excessive, Award 18804 (Franden) and should be denied on this ground alone.

Having given careful consideration to the entire record, the arguments and to the awards cited by the parties, it is the opinion of this Board that the disputed work comes within the exception contained in Rule 1(b). For all of the reasons stated above the claim is denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: /s/ Nancy J. Dever
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1984

No. 87-776

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TRANSPORTATION COMMUNICATIONS UNION,
Petitioner,

v.

BALTIMORE AND OHIO RAILROAD COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

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On December 1, 1987, this Court decided *United Paperworkers v. Misco, Inc.*, 56 U.S.L.W. 4011 (U.S. Dec. 1, 1987), in which it reversed a judgment setting aside an arbitration award on the grounds that it violated public policy. In its unanimous opinion the Court articulated several principles that are directly relevant to the question presented by this petition.

A. Central to the Court's analysis and holding was the principle that judicial review of labor arbitration awards is " 'very limited' ". 56 U.S.L.W. at 4013 (quoting *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 567 (1960)). Justice White emphasized that the *Steelworkers* trilogy "made clear almost 30 years ago" that "the courts play only a limited role when

asked to review the decision of an arbitrator." 56 U.S.L.W. at 4013. Courts, he wrote, lack authority "to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Id.* The federal labor policy " 'would be undermined if courts had the final say on the merits of the awards.' " *Id.* (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960)). *Misco* accordingly reaffirmed the very limited role of the reviewing court in connection with each of the arbitrator's tasks: factfinding, contract interpretation, and the formulation of remedies. *See* 56 U.S.L.W. at 4014. With respect to contract interpretation—at the heart of the question presented by this petition—*Misco* held that the function of the reviewing court " 'is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.' " 56 U.S.L.W. at 4013 (quoting *United Steelworkers v. American Manufacturing Co.*, 363 U.S. at 568).

Misco also reiterated the rationale for very limited judicial review: national labor policy—embodied in statutory law—consigns the resolution of contract interpretation questions to the expert, relatively speedy, and inexpensive process of arbitration. This policy would be defeated by intrusive review. *See* 56 U.S.L.W. at 4014. The Court also explained that "grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining. It is through these processes that the supplementary rules of the plant are established." *Id.* For all of these reasons, the Court unanimously held in *Misco* that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.*

B. As noted above, *Misco* reaffirmed the importance of the teachings of the *Steelworkers* trilogy of 1960. As petitioner has explained, Pet. at 16-18, the Court has yet to provide similarly specific guidance regarding the precise meaning of the jurisdictional provision of the Railway Labor Act, 45 U.S.C. § 153, First (q), enacted in 1966. In *Union Pacific Railroad v. Sheehan* the Court held that section 3, First (q) "means just what it says." 439 U.S. 89, 93 (1978) (per curiam). This case affords the Court a much-needed opportunity definitively to establish what Congress meant when it somewhat opaquely said in section 3, First(q) that a court may set aside an order of the Adjustment Board "for failure of the order to conform, or confine itself, to matters within the scope of the [Board's] jurisdiction." 45 U.S.C. § 153, First(q).[1]

Although the arbitration award at issue in *Misco* was rendered pursuant to a collective bargaining agreement, there is every reason to believe that the axioms of "very limited" judicial review of arbitration awards articulated in *Misco* apply fully to judicial review of arbitration awards under the Railway Labor Act. According to the legislative history, sections 3, First(p) and (q) were intended to limit review of Adjustment Board awards "to those grounds commonly provided for review of arbitration awards." S. Rep. No. 1201, 89th Cong., 2d Sess. 3 (1966). *See* Pet. at 16.[2] Moreover, the Court's reasons for limiting judicial review of arbitration awards rendered pursuant to private, consensual agreements should apply with equal or greater force where—as under the Railway Labor Act—arbitration is conducted

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[1] Notwithstanding respondent's assertion to the contrary, *see* Op. Cert. at 21, and despite the uncertainty of some of the lower courts as to its meaning, *see* Pet. at 17-18, the Court has never construed this statutory language.

[2] Respondent agrees with this analysis of the legislative history. *See* Op. Cert. at 22-23.

pursuant to a Congressional mandate embodying the national labor policy in the transportation industry. *See* Pet. at 15-16.

C. There is also good reason to believe that the courts below would have decided this case differently if they had decided it after *Misco*. The court of appeals affirmed the judgment setting aside the Adjustment Board's awards because of the Board's failure to discuss "either the Scope Rule provisions at issue here, or their applicability to the instant case." Pet. App. at 9a. Yet *Misco* states that the courts " 'have no business . . . determining whether there is particular language in the written instrument which will support the claim.' " 56 U.S.L.W. at 4014 (quoting *United Steelworkers v. American Manufacturing Co.*, 363 U.S. at 568). The district court was obviously influenced by its view that the remedy formulated by the Adjustment Board was inappropriate. *See* Pet. at 6, 7 n.9. *Misco*, by contrast, clearly holds that the arbitrator " 'is to bring his informed judgment to bear in order to reach a fair solution of the problem. *This is especially true when it comes to formulating remedies.*' " 56 U.S.L.W. at 4015 (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597) (emphasis in the original).

For the foregoing reasons, and for the reasons set forth in the petition, the petition for certiorari should be granted. If the Court decides not to grant the petition, however, petitioner respectfully requests that it vacate the judgment of the court of appeals and remand this case for reconsideration in light of the principles recently articulated in *Misco*.[3]

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[3] *Cf. United Paperworkers v. S.D. Warren Co.*, No. 87-583 (U.S. Dec. 14, 1987) (vacating and remanding for reconsideration in light of *Misco* the judgment of the court of appeals setting aside an arbitration award as violative of public policy).

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December 16, 1987

No. 87-776 (4)

In The

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October Term, 1987

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OHIO RAILROAD COMPANY,

Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Union has asserted, in its Supplemental Brief in Support of its Petition for a Writ of Certiorari, that this Court's recent decision in *United Paperworkers v. Misco, Inc.*, — U.S. —, 56 U.S.L.W. 4011 (1987), is "relevant to the question presented by [the Union's] petition," and, presumably, supports the Union's assertion that a writ of certiorari should be granted. *See Supplemental Brief* at 1. Since *Misco* did not alter the prior holdings of this Court concerning the standards to be applied by the lower

courts in reviewing arbitral decisions and, instead, reiterated what this Court "made clear almost 30 years ago" in the *Steelworkers* trilogy, *Misco,* 56 U.S.L.W. at 4013, nothing in *Misco* should compel the Court to grant certiorari in this case.

A. First, this Court granted certiorari in *Misco* because "the Courts of Appeal [were] divided on the question of when courts may set aside arbitration awards contravening public policy . . ." *Id.,* 56 U.S.L.W. at 4013. *Misco* reversed a decision of the Fifth Circuit which held that an arbitrator's reinstatement of an employee who had been dismissed because he allegedly possessed marijuana on plant premises would violate the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." *Id., quoting Misco,* 768 F.2d 739, 743 (5th Cir. 1985). This Court set aside the decision of the Fifth Circuit, because the Fifth Circuit's decision did not conform to the guidelines established by this Court in *W.R. Grace & Co. v. Rubber Workers,* 481 U.S. 757 (1983), and because no violation of the public policy enunciated by the Fifth Circuit "was clearly shown", even if that Court of Appeals' formulation of that public policy was correct.

In the present case, no issue of "public policy" is presented. The opinions of the trial court and the Fourth Circuit did not consider issues of "public policy" and, instead, ruled that the NRAB panel decisions at issue here exceeded the jurisdiction of the NRAB. Since *Misco* was decided on issues of "public policy", the holding in *Misco* is irrelevant to any decision in this case.

For similar reasons, this Court need not remand this case for reconsideration in light of *Misco,* as suggested by

the Union. There is no reason to believe that the Fourth Circuit would have decided this case any differently had it reached its decision after *Misco*. The decision in *S.D. Warren Co. v. United Paperworkers,* 815 F.2d 178 (1st Cir. 1987), *remanded* — U.S. —, No. 87-583 (Dec. 14, 1987), upon which the Union has relied, was vacated and remanded by this Court because it held that an arbitrator's award should be set aside because it violated "public policy". *Id.*, 815 F.2d at 186-87. This case does not involve such "public policy" considerations.[1]

B. Second, "arbitration" before the NRAB was compelled in this case by congressional enactment, the Railway Labor Act, 45 U.S.C. § 151 *et seq.* While it is true that judicial review of NRAB awards was intended to "be limited to those grounds commonly provided for review of arbitration awards," as the Union suggests, *see Supplemental Brief* at 3, *quoting* S. Rep. No. 1201, 89th Cong., 2d Sess. 3 (1966), [1966] U.S. Code Cong. & Admin. News, p. 2287, it is equally true that Congress intended that the Federal courts would "have the power to decline to enforce an award is [is] actually and indisputedly without foundation in reason or fact . . ." S. Rep. No. 1201, 89th Cong., 2d Sess. 3 (1966), [1966] U.S. Code

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[1]Moreover, contrary to the Union's intimation, *see Supplemental Brief* at 4, the decision of the Fourth Circuit did not even address the issue of remedies. To the contrary, although the District Court vacated the monetary awards in this case on the separate ground that they awarded the Union "penalty pay", the Fourth Circuit stated explicitly that it "need not reach, and therefore, [did] not decide the issue of penalty pay." *Pet. App.* at 9a. Hence, the Union's incantation of a small portion of the language of *Enterprise Wheel,* quoted in *Misco,* relating to the scope of an arbitrator's discretion in formulating remedies, *Supplemental Brief* at 4, is misleading and uninformative.

Cong. & Admin. News, p. 2287. *See, also, Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.*, 415 F.2d 403, 410 (5th Cir. 1969).

In *Misco,* the Court considered an agreement to arbitrate, voluntarily undertaken in a collective bargaining agreement. However narrow may be the scope of the lower Federal court's review of arbitral awards rendered under pure collective bargaining agreements, even *Misco* did not foreclose all review. In *Misco,* this Court gave explicit recognition to the principle that an "arbitrator may not ignore the plain language of the contract . . ." *Misco,* 56 U.S.L.W. at 4014, *citing Steelworkers v. Enterprise Wheel,* 363 U.S. 593, 599 (1980). Both in *Enterprise Wheel* and again in *Misco* this Court has said that "the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must *draw its essence from the contract* and cannot simply reflect the arbitrator's own notions of industrial justice." *Misco,* 56 U.S.L.W. at 4014 (emphasis added).

The constitutional considerations implicated in *Misco,* where arbitration occurred purely under private agreement, are different from those which may be implicated here, where "arbitration" is compelled by Federal statute. If courts were bound by Federal statute to uphold wholly baseless awards, serious constitutional problems would exist under Article III, which guarantees the right to judicial review. *See, Northern Pipeline Const. Co. v. Marathon Pipeline Co.,* 102 S.Ct. 2858 (1982). Entirely different considerations would apply in the purely private sphere, where parties may contract away some of their rights to judicial review, in part by concluding agreements to arbitrate. What the Union seeks in this case is a hold-

ing by this Court that the lower Federal courts must uphold every award rendered by the NRAB, no matter how egregious. Clearly this is not what Congress intended. Equally clearly, *Misco* does not compel that conclusion.

In the present case, the Fourth Circuit held that the NRAB had exceeded its jurisdiction through its manifest disregard of the collective bargaining agreement, and its failure even to discuss critical contract terminology. *Pet. App.* at 8a. The Court of Appeals held that, like an arbitrator, the NRAB is not permitted "to rewrite the provisions of the collective bargaining agreement." *Id.* As noted in the Railroad's Opposition to the Union's Petition for a Writ of Certiorari, the Fourth Circuit's decision was fully consistent with a long series of federal cases holding that an arbitrator is without authority to disregard or modify plain and unambiguous contract provisions, and that an arbitration award will be set aside when it contravenes the express language of a labor contract. *Opposition* at 20-21.

The Fourth Circuit similarly noted in this case that an NRAB award may be set aside if it is "wholly baseless and completely without reason, . . . if [it is] actually and indisputedly without foundation in reason or fact, . . . or if the NRAB decision *fails to draw its essence from the collective bargaining agreement . . .*" *Pet. App.* at 7a-8a (emphasis supplied). All that the Fourth Circuit did in this case was follow well established legal principles, reiterated without alteration in *Misco*. Once again, the Fourth Circuit would not have decided this case any differently had it reached its decision after *Misco*.

C. The opinion of the Fourth Circuit in this case fully conforms to the prior holdings of this Court. Because the decision in *Misco* simply reiterated what this Court "made clear almost 30 years ago" in the *Steelworkers* trilogy, *Misco*, 56 U.S.L.W. at 4013, and did not alter those prior holdings, nothing in *Misco* should compel the Court to grant certiorari in this case.

Respectfully submitted,

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